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In the Supreme Court of the United States

October Term, 1957.

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation,
Petitioners,

vs.

DANUBE McFARLIN, MAMIE SUE McFARLIN, DAVE MORGAN, DAVE MORGAN, doing business as DAVE MORGAN OIL COMPANY, R. L. TAYLOE, ROSALIND NO EAR, and THE BUREAU of INDIAN AFFAIRS of the DEPARTMENT of INTERIOR of the UNITED STATES of AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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(5) The second proviso to Section 1, Title 75, *supra*, was enacted to protect vested rights in oil, gas and other minerals existing at the time of the enactment of said proviso or thereafter found to exist in the beds of all streams from being impaired or destroyed by Section 335, Title 60, *supra*, or any other statute 19

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IN THE SUPREME COURT OF THE UNITED STATES,
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No._____

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the Tenth Circuit entered in the above entitled cause on the 21st day of October, 1957.

Citations to Opinions Below.

The opinion of the United States Court of Appeals for the Tenth Circuit is as yet unreported, but appears as part of the record (Tr. 3-10) and is printed and made a part hereof as "Appendix A."

Jurisdiction.

The judgment of the trial court, entered January 23, 1957, appears in the printed transcript (P. Tr. 46-47) and is based upon findings of fact and conclusions of law appearing in the printed transcript (P. Tr. 33-46). The opinion of the United States Court of Appeals of the Tenth Circuit affirming said judgment and the judgment in accord therewith was entered on the 21st day of October, 1957. On the 12th day of November, 1957, within the time allowed by Rule 24 of said court, a petition for rehearing was filed (Tr. 14-30). The petition for rehearing was by order of said court denied November 29, 1957 (Tr. 33) Thereafter on December 9, 1957, the Court of Appeals entered its order staying the mandate pursuant to its judgment for a period of 30 days to allow for a petition to this Court for writ of certiorari (Tr. 33).

This petition is filed within 30 days from the final judgment of the United States Court of Appeals for the Tenth Circuit, and is accompanied by a certified copy of the printed transcript of record filed in the appellate court, citations to which are referred to herein as "P. Tr." together with a certified copy of the proceedings had in the appellate court, designated Transcript of Record, citations to which are referred to as "Tr." The jurisdiction of this Court to review the judgment is invoked under Title 28, United States Code, Sections 1257(3) and 2101(c).

Questions Presented.

(1) Did the government trust patent, issued prior to statehood, to Lot 7, Section 30, Township 25 North, Range 1 East, according to the approved government plat and survey vest in Grover Storyteller, the patentee, fee title to

the 30.70 acres of upland and to the center of that portion of the Salt Fork, a non-navigable stream, bordering on said lot?

(2) Is a state statute (Sec. 335, Title 60, O S. 1951) violative of the Constitution of the United States when it divests or diminishes the right and use of property acquired by patent prior to statehood so long as the boundaries of said property can be definitely ascertained by use of the approved government map and survey?

(3) Can the courts construe a state statute (Sec. 335, Title 60, *supra*) to impair, divest or diminish the right and use of property acquired by patent prior to statehood or increase or enlarge the estate vested by a similar federal patent?

(4) Can the federal courts in interpreting a state statute (Sec. 335, Title 60, *supra*) disregard the construction placed thereon by the highest court of that state (*Hunzicker* v. *Kleeden*, 161 Okl. 102, 17 P. 2d 384; *Mapes* v. *Neustadt*, 197 Okl. 585, 173 P. 2d 424) and the limitations and restrictions placed on said statute in its adoption by the legislature (Section 1, Title 75, O. S. 1951)?

Statutory Provisions Involved.

This was an equitable suit to quiet title in the respondents with judgment in their favor, which was affirmed by the United States Court of Appeals, and the review of which is sought here. The judgment and its affirmation were based upon Section 335, Title 60, O. S. 1951, and a strict construction of the common law applicable to accretions. The petitioners claim that said section has been modified

and abrogated at least in so far as mineral rights are concerned by Section 1, Title 75, O. S. 1951, and that the common law has been abrogated and modified by Section 2, Title 12 O. S. 1951, and the decisions of the Supreme Court of Oklahoma, hereinafter referred to. The following provisions of the statute are pertinent herein: Section 335, Title 60, *supra*, to-wit:

> "*Riparian Accretions.* Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank." Sec. 2, O. S. 1951, Page 209.

Sec. 1, Title 75, *supra*, reads as follows:

> "*Adoption — Exception — Construction.* The Revised Code of Laws prepared under the authority and by the direction of the Legislature, by Samuel H. Harris, and Jean P. Day, Code Commissioners appointed by the Governor and under the authority of Senate Bill No. 261 of the Legislature of 1909, entitled 'An Act to provide for compiling, collating, revising, digesting, suggesting additional legislation, adapting to the Constitution of the state public laws of the State of Oklahoma, creating a Commission to formulate a Code of Laws of the State of Oklahoma, defining their duties and providing for their compensation and expenses, and declaring an emergency': said code being identified as volumes 1 and 2, entitled 'Revised Laws of the State of Oklahoma, 1910,' certified by said commissioners and by the Chairman of the Code Revision Committee of the Senate and House of Representatives, and reported and recommended by said committees for adoption as by them amended and corrected, be and the

same is hereby adopted and made of force as the Revised Laws of the State of Oklahoma; provided that Section 6639 of the Revised Laws, being a provision defining the rights of the owners of land abutting upon navigable waters, shall not be adopted or become a part of said revised laws under the provision of this act; provided, further, *that this act shall not be construed to alter, change, impair, disparage, vest or divest any right or interest of the United States Government, the State of Oklahoma, any of the Five Civilized Tribes of Indians or Nation, or any riparian, or abutting owner of any of the river beds, or streams, of the State of Oklahoma, or to change any interest, or ownership of the sand, gravel, oil, gas or other mineral substance, or product, which may now exist, or which may hereafter be discovered, in or under such river beds or streams.*" (Italics ours.) Vol 2, O. S. 1951, page 1127.

Section 2, Title 12, *supra*, reads as follows:

"*Force of Common Law.* The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general Statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shal be liberally construed to promote their object." Vol. 1, O. S. 1951, p. 613.

Statement.

The principal and controlling issues involved herein are between respondent Rosalind No Ear, a restricted Indian and Danube McFarlin and Mamie McFarlin, hereinafter referred to as "McFarlins," the admitted owners of Lot 9, and the petitioners herein, owners of Lot 7.

The respondents "McFarlins" commenced this action May 24, 1956, in the United States District Court for the Western District of Oklahoma seeking to enlarge and extend the federal grant of Lot 9, to Rosalind No Ear dated March 19, 1906, to include a part of Lot 7 conveyed by federal grant dated October 12, 1895, to petitioners' predecessor in title, basing their claim solely upon a state statute (P. Tr. 1-7).

There was little or no controversy over the facts involved and the same may be summarized as follows:

A map of Township 25 North, Range 1 East with field notes of the survey was filed and approved in the United States general land office September 16, 1872 (P. Tr. 13) and among the lands platted and surveyed were Lot 7 containing 30.70 acres and Lot 9 containing 11.82 acres. Also shown thereon were Lots 6 and 8, not involved herein, but all were a part of the Northeast Quarter of Section 30 thereof, which is now Kay County, Oklahoma. Thereafter an Indian Trust patent dated October 12, 1895, was issued to Grover Storyteller, a Ponca Indian, and among the lands conveyed thereby was Lot 7 described as containing 30.70 acres (P. Tr. 15-16), which land by mesne conveyances is now owned by the petitioners. Thereafter on March 19, 1906 a similar trust patent was issued to Rosalind No Ear conveying Lot 9 described as containing 11.82 acres (P. Tr. 16). In 1948 Rosalind No Ear conveyed to the "McFarlins" amongst other land the surface and one-half of the minerals to Lot 9 reserving in herself an undivided one-half interest in the minerals thereunder for a period of fifteen years.

Lots 6 and 7 bordered on the south bank of the Salt Fork and Lots 8 and 9 bordered on the north bank thereof.

The Salt Fork slowly and gradually by erosion and submersion made inroads on Lot 7. About one-half of said erosion occurred prior to 1949 when "McFarlins" erected a large dike approximately 1500 feet long and some 6 or 8 feet high along the East bank of the Chikaskia River approximately 3/4 of a mile north and west of Lot 7 where said river empties into the Salt Fork. This dike prevented the water from the Chikaskia River from overflowing the north bank of the Salt Fork and submerging a large portion of Lots 8 and 9 and resulted in increasing the force with which the water from the Chikaskia flowed against the south bank of the Salt Fork bordering on said Lot 7. This increased force caused by the erection of the dike accounted for approximately ½ of the erosion and submersion of Lot 7 occurring since the date of the original plat and survey (P. Tr. 72).

The 9.83 acres involved herein are all within the exterior boundaries of Lot 7 as fixed by the official government plat and survey, which boundaries are capable of being ascertained with the same degree of exactness as section lines of the government survey. The 9.83 acres involved herein and described by course and degree in the judgment of the court has appeared largely as dry land between the center of the Salt Fork as it existed in January of 1956 and the center of Salt Fork as shown on the government plat and survey. This is revealed by a plat prepared by the respondents, which although introduced in evidence in the trial court, is not included within the printed record herein and which in so far as pertinent is attached hereto as "Appendix B" for the convenience of the Court.

"McFarlins" allege federal jurisdiction on the grounds that the land in controversy is valued in excess of $3,000.00 and that the United States Government is a necessary and

real party in interest in its capacity of guardian for the restricted Ponca Indian, Rosalind No Ear.

Based upon the above facts "McFarlins" seek to enlarge their grant of Lot 9 as fixed by the government survey of 1872 to include the above described 9.83 acres of Lot 7. "McFarlins" admittedly have no equitable or record title to the land or to any portion of Lot 7 nor do they have any legal title thereto except that which they claim under Section 335, Title 60, O. S. 1951; it being their contention that according to said statute the title of the petitioners to the 9.83 acres which has reappeared within the exterior boundaries of Lot 7 was destroyed and the same has accreted to Lot 9. The trial court, based on said theory, held that the petitioners' title to the 9.83 acres of Lot 7 which has reappeared had been lost and destroyed and that the same had accreted to Lot 9. The Court of Appeals has affirmed this judgment.

Reasons for Granting the Writ.

I.

The opinion of the court of appeals, based entirely upon section 335, title 60, *supra*, had divested the petitioners of title to property traced to federal grant, issued prior to statehood, and valued in excess of $3,000.00 and therefore presents a question of extreme importance in defining the guarantees to citizens of their rights heretofore protected by the 5th and 14th amendments to the constitution of the United States.

Petitioners by this proceeding seek to have this Court review and determine the correctness of the judgment of the trial court (P. Tr. 46-47), affirmed by the Court of Appeals in its opinion attached hereto as "Appendix A," which resulted in the following:

(a) Petitioners, the owners of the legal title traced to a government patent to Lot 7, dated October 12. 1895 (P. Tr. 15-16), have by the courts below been divested of the legal title to 9.83 acres thereof, valued in excess of $3,000.00 without compensation nor based upon any equitable principle.

(b) The judgment has further quieted title to said 9.83 acres in respondents, McFarlins and No Ear, who are without legal title thereto, but owners of the legal title to Lot 9, by virtue of patent dated March 19, 1906 (P. Tr. 16). No part of said 9.83 acres of Lot 7 is within the exterior boundaries of Lot 9 as disclosed by government map and survey of 1872, nor do respondents assert ownership by virtue of any equitable principle.

The mere statement that the judgment divested petitioners of legal title to their private property traced to government patent, without compensation, and vested the title in respondents who had no legal title, or equitable claim thereto, appears violative of the 5th and 14th Amendments of the Constitution of the United States and is so far reaching and drastic and contrary to American Jurisprudence that the same should be reviewed by this Court before the same becomes final.

In support of a reason for granting the writ we direct the Court's attention:

(1) **To the well settled general rule prevailing in Oklahoma, to-wit:**

"That a plaintiff in a quiet title action need not show a perfect or complete title but merely that his title is superior to that of the adversary selected as a defendant." See *Bonner* v. *Smith,* (Dist. Ct. E. D., Okla.) 144 Fed. Suppl. 895; *Smith* v. *Reneau.* 188 Okl. 629, 112 P. 2d 160; *Keith* v. *Lawton,* 195 Okl. 157, 155 P. 2d 16.

The respondents herein being the plaintiffs below had the burden of establishing a title superior to that of these petitioners.

(2) The patent dated October 12, 1895 to Lot 7 vested title in the patentee to the center of said stream.

It is uncontroverted that the petitioners' title is traced to an Indian trust patent dated October 12, 1895 (P. Tr. 15) to all of Lot 7 containing 30.70 acres, which prior thereto had been surveyed by the government and a map thereof together with field notes were approved September 16, 1872 (P. Tr. 13).

The force and effect of said patent under well established rules of this Court, the Court of Appeals of the 8th and 10th Circuits and State of Oklahoma as applicable hereto may be stated as follows:

> The aforesaid Indian trust patent to Lot 7 containing 30.70 acres, being issued prior to statehood and bordering on Salt Fork, a nonnavigable stream, vested title in petitioners' predecessors in title, the allottee, not only to the 30.70 acres of upland but to the center of said nonnavigable stream.

See *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, 270 Fed. 100, 109. The question involved therein was whether a patent to the Osages bordering on the Arkansas River, a nonnavigable stream, vested title in the Osages not only to the upland but to the center of said stream. The Court in said case announced the general rule applicable to government trust patents to land bordering on nonnavigable streams that the title vested at the date of the federal grant and included not only the upland but title to the center of the

stream. The Court in discussing this title to the river bed stated as follows:

> "Such a riparian right of the owner of the bank to the bed of the stream was a valuable one of which, 'when once vested the owner can only be deprived in accordance with the established law and if necessary that it be taken for public good upon due compensation'."

Said judgment was affirmed by this Court in *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, 260 U. S. 77, 43 S. Ct. 60, 64.

To the same effect is the law announced in *U. S.* v. *Elliott*, (10th Cir.) 131 F. 2d 720; *U. S.* v. *Champlin Refining Co.*, (10th Cir.) 157 F. 2d 769, affirmed 331 U. S. 788, 67 S. Ct. 1346; *Choctaw-Chickasaw Nations* v. *Seay*,, (10th Cir.) 235 F. 2d 30; and by the Supreme Court of Oklahoma in numerous cases among which are *Hunzicker* v. *Kleeden, supra,* and *Aladdin Petroleum Co., et al.*, v. *State*, 200 Okl. 134, 191 P. 2d 224, wherein it is stated:

> "Trust patents of riparian land along the Arkansas River, a nonnavigable river, executed by the United States to Indian allottee prior to admission of Oklahoma into the Union and conveying * * * carried title to the center line of the river opposite such lots under common law rule which was recognized by the United States as operative in Oklahoma Territory, with the conveyance expressly including river bed in the grant."

See also *Gable* v. *Angle,* (W. Dist. of Okla.) 7 Fed. Supp. 967, where the same rule was applied to patent issued to settlers prior to statehood.

(3) The petitioners relying upon the above decisions submitted to the trial court finding of fact No. 2 and conclusion of law No. 1, (P. Tr. 29) as follows:

> "The court concludes as a matter of law that un-

der the facts above stated Grover Storyteller was vested with a fee title subject to the trust provisions to Lot 7 which extended to the center of Salt Fork as it existed on October 12, 1895. There being no evidence of any change in the river between the date of the survey and the date of the patent the court presumes as a matter of law there was no change."

The court refused the above conclusion (P. Tr. 30) apparently upon the theory that it was immaterial whether the patent to petitioners' predecessor was obtained before statehood by federal grant, or whether the patent vested in petitioners' predecessor a fee title not only to the upland but to the center of the nonnavigable stream. The court on the contrary found petitioners held only a defeasible title and concluded as follows:

"That the center meander line of the subject stream has at all times concerned constituted the boundary line between Lot Nine and Seven and continues to be the boundary line. That as the location of the stream has changed likewise has the boundary line changed."

The force and effect of the above conclusion when considered in connection with the judgment of the trial court, affirmed by the Court of Appeals, has divested petitioners of title not only to the bed of the nonnavigable stream as shown by the government plat and survey and the plat attached to respondents' petition (P. Tr. 7) but destroyed their title to almost all of the upland of Lot 7 on the opposite bank of Lot 9 thereby reducing the petitioners' title not only to the bed of the stream but to the upland totaling 9.83 acres from a fee title to a base and defeasible floating and shifting title. Said holding we submit is in irreconcilable conflict with the law announced in *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, *supra*, and other cases above cited.

The Court of Appeals in referring to the above cases (Tr. 10) stated:

> "None of them involved accreted land. They all involved the ownership of the bed of nonnavigable rivers and the question in each was whether the grantor intended to reserve from the deed of conveyance of land bordering on such stream his admitted ownership of the land in the bed of the river."

Said decisions do hold without qualification the patent vested in the patentee a fee title to the center of the stream as of the date of the grant. The title having vested, the government, the state, nor third persons could not divest the patentee of that vested right except in accordance with the established law or for a public use with compensation. See *Choate* v. *Trapp*, 224 U. S. 665, 34 S. Ct. 565. Clearly if the title is vested for one purpose it is vested for all

(4) The Supreme Court of Oklahoma in *Hunzicker v. Kleeden*, *supra*, and *Mapes v. Neustadt*, *supra*, has modified the common law of accretion and the force, effect and application of section 335, title 60, *supra*, pursuant to section 2, title 12, O. S. 1951.

The Court of Appeals has affirmed the judgment upon the theory that Section 335, Title 60, *supra*, is a strict common law statute and that neither the statute nor the strict common law rule have been modified or abrogated by the legislature or courts of the State of Oklahoma.

There is a great conflict in the opinions of the courts of the various states on the question of riparian rights. Some have adopted the common law rule to its fullest extent;

others have modified it and others have completely repudiated the same. This was recognized by this Court in *Packer* v. *Byrd*, 137 U. S. 661, 11 S. Ct. 210, 212. While the stream involved in that case was navigable, the Court announced certain general rules of law applicable to riparian rights and the construction of patents to riparian lands. This Court therein held that the United States courts will construe the federal grants without reference to rules of construction adopted by the state courts and their grants. Instant rights attached to the ownership of the property may be determined by the states subject to the conditions that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. The court in construing the patent in said case stated:

> "We find nothing either in any act of Congress or in any decision of the federal courts which would enlarge the effect of the grant."

The above case was cited by this Court in *Brewer-Elliott Oil & Gas Company* v. *U. S.*, *supra*, in construing a grant upon a nonnavigable stream. The court in that case in discussing what incidents attached to a patent that might be construed according to local law stated as follows:

> "Thus the right of the riparian owner under such grant may be limited by the law of the state either to high or low water mark or extended to the middle of the stream."

The Supreme Court of Oklahoma in *Hunzicker* v. *Kleeden*, *supra*, and in *Mapes*, v. *Neustadt*, *supra*, likewise recognized the great conflict among the decisions of the courts of the various states as to the law of accretion effecting vested rights of riparian owners.

In *Hunzicker* v. *Kleeden, supra,* the land involved was town lots and riparian. The court in that case stated:

> "Where land of defendant was riparian and land was washed away so it became riparian property, thereafter the stream recedes then the plaintiffs only acquire that portion of the land which they had prior to said erosion by the stream and defendants acquire such property as they had prior to the same being eroded by said stream."

This was based upon the qualification that the land of each could be identified. A simple glance at "Appendix B" attached hereto should be sufficient to conclusively establish that there is no question about the fact that the boundaries of the land involved herein could be definitely and exactly established.

The court then referred to the case of *Allard* v. *Curran,* 41 S. Dak. 73, 168 N. W. 761, from which state Section 335, Title 60, *supra,* was adopted by the state of Oklahoma. The South Dakota court in that case stated:

> "We can see no reason, in justice or equity, why the land involved in this case, after it had been restored by the river, should be given to respondent merely because the river had at some time touched her land. After her land had been fully restored to her, she had all that she was entitled to or in good conscience could demand."

The above language is applicable and appropriate herein for the reason that no part of the land patented to respondent, Rosalind No Ear, has ever been interfered with, eroded or washed away. Is there any justice or equity in her claiming or receiving title to 9.83 acres of land of Lot 7 of a value in excess of $3,000.00 which is not within the exterior boundaries of Lot 9 as fixed by the government survey.

The South Dakota court in that case further stated:

> "That the rational rule seems to be that announced in *Ocean City Ass'n* v. *Shrivner*, 64 N. J. Law 550, 46 A. 690, 51 L. R. A. 425, where it is stated as follows: 'We believe that, after appellants' land had been restored by the action of the river, being capable of identification it belonged to appellant and should be treated as it had never been submerged at all'."

The opinion of the Court of Appeals herein stated that the trial court had found that the method by which the aforesaid 9.83 acres of Lot 7 had been restored was accretion, therefore the court held since it was restored by accretion it would attach to Lot 9. Simply because the land was restored through accretion it does not follow that it accretes to Lot 9, rather than remaining a part of Lot 7 of which it was originally a part. Such is the holding in *Stockley* v. *Cessna*, (6th Cr.) 119 Fed. 812, 831, where the lands of one Trigg through a change in the course of the river had been restored, wherein the court stated:

> "These submerged Trigg lands have been restored, through accretion or some other process, and are now dry land. It cannot be pretended that, because the surface of these two bodies of Trigg land was washed off, Trigg lost his title to the land so submerged, beyond recovery."

The court further stated:

> "The law is otherwise. Land lost by erosion or submergence is regained to the original owner of the fee when by reliction or accretion the water disappears and the land emerges."

The Oklahoma court in *Hunzicker* v. *Kleeden, supra*, cited the above statements with approval and also quoted from *Keel, et al.*, v. *Sutton*, 142 Tenn. 341, 219 S. W. 351,

353. In that case because of inroads of the river the land had become untenable and the parties abandoned it. The Tennessee court held therein that this did not serve to divest them of title stating:

> "It is well settled that where land becomes submerged by reason of erosion, or from some other cause, title thereto is not lost, and when the same reappears, either by accretion or reliction, the original owner is entitled to take possession of and hold the property reclaimed. Citing cases."

The Oklahoma court in *Hunzicker* v. *Kleeden, supra,* after citing with approval the above decisions, announced the following rule:

> "Where a nonnavigable stream, * * * erodes away a portion of the land of defendants, defendants' title to said land continues to exist so long as any portion of that part of the land which was defendants continues to exist as a part of the river bed, and of course, under this theory and under the theory of the cases cited above, when the river recedes and abandons the river bed, said land continues to be the property of the former owners."

The case of *Hunzicker* v. *Kleeden, supra,* was reaffirmed by the Supreme Court of Oklahoma in *Mapes* v. *Neustadt, supra.* In said case Mapes were asserting title to certain described real estate and alleged they were the owners of certain land extending to the South (not included in the specific description of the land) by reason of accretion. The trial court found and held it was possible to identify the land of the contesting parties, and stated:

> "And so being the equities are with Neustadt and not with Mapes and each are now the owner of what was originally patented and no more."

In affirming the judgment the court stated:

> "We think that the reliance of Neustadt on the equitable principles applied in the *Hunzicker* case and * * * the ability to identfy his land by government plat and survey following the restoration of his land justified the trial court in rendering judgment in his favor."

The court further recognized the sharp diversity of opinions of the various courts on the subject of accretion and referring to the South Dakota cases stated:

> "Where the chief reliance for the rule adopted therein was upon the ability to identify according to government plat and survey was the basis for the *Hunzicker* case. We believe it controls here."

This same rule of law was further affirmed and adopted by the Court of Appeals for the 10th Circuit in the case of *Herron* v. *Choctaw-Chickasaw Nations,* 228 F. 2d 830. In that case Herron was the owner of an 80-acre tract and the tribes were the owners of 13 acres adjoining, all of which became eroded and submerged and as the stream changed its course the water receded the land was restored. Herron claimed the land by accretion. The Court of Appeals in affirming the judgment of the trial court stated:

> "Whatever the rule may be elsewhere, it is the law in Oklahoma that where because of inroads of a river riparian land is lost by erosion or becoming submerged but through subsequent change in the course of the river the water disappears and the land reappears, and the boundaries are susceptible of being definitely identified, title to the restored land is vested in the owner of the fee at the time the erosion or submerging occurred. *Hunzicker* v. *Kleeden,* 161 Okl. 102, 17 P. 2d 384; *Mapes* v. *Neustadt,* 197 Okl. 585, 173 P. 2d 442. The latter case was one involving avulsion of a river,

but the general rule applicable to cases involving erosion or submerging of land was clearly recognized with unqualified approval."

We submit the above language of the court refutes the theory the common law has not been modified by the decisions in *Hunzicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra.*

It is apparent we have two conflicting decisions of the Circuit Court of Appeals based on facts not materially different. In *Herron* v. *Choctaw-Chickasaw Nations, supra,* the Court held that the law announced in *Hunzicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra,* is the settled law in Oklahoma irrespective of what it may be in other jurisdictions.

In the case under consideration the Court stated that the law of accretion is governed and controlled by the common law. Clearly the above cases are in conflict. The *Herron* case has followed the interpretation placed upon Section 335, Title 60, *supra,* by the Supreme Court of Oklahoma. The opinion herein has disregarded said construction and applied the strict common law.

(5) The second proviso to section 1, title 75, *supra,* was enacted to protect vested rights in oil, gas and other minerals existing at the time of the enactment of said proviso or thereafter found to exist in the beds of all streams from being impaired or destroyed by section 335, title 60, *supra,* or any other statute.

The aforesaid statute was Section 3210, Compiled Laws of South Dakota of 1887 when it became Section 4291, Okla-

homa Territory Statutes of 1890 by adoption, and was carried forth into succeeding Oklahoma statutes and was by the Oklahoma Code Commission, which compiled the 1910 Revised Statutes, carried forth as Section 6750. The legislature in 1910-1911 adopted said revised laws, including the above section, without qualification. The legislature of 1913 by Chapter 75, Section 1, amended the Act of 1910-1911 Session Laws by adding thereto two provisos.

The enacting clause of the amendment of 1913 reads as follows:

> "Be It Enacted by the People of the State of Oklahoma:
>
> *Code Adopted—Proviso as to Riparian Rights.* Section 1. Section 1 of Chapter 39 of the Session Laws of Oklahoma of the Session of 1910-1911, being House Bill No. 562 of said session, is hereby amended to read as follows:"

The first proviso included in the 1913 amendment, not included in the 1910-1911 act adopting said statute, reads as follows:

> "Provided that Section 6639 of the Revised Laws, being a provision defining the rights of the owners of land abutting upon navigable waters, shall not be adopted or become a part of said revised laws under the provision of this act,"

and thereby eliminated said section from the statutes.

The second proviso reads as follows:

> "Provided further, that this act shall not be construed to alter, change, impair, disparage, vest or divest any right or interest of the United States Government, the State of Oklahoma, any of the Five Civilized Tribes of Indians or Nation, or any riparian. or abutting owner of any of the river beds, or streams, of the State of Oklahoma, or to change any interest, or ownership of the sand, gravel, oil, gas, or other mineral sub-

stance, or product, which may now exist, or which may hereafter be discovered, in or under such river beds or streams."

Section 335, Title 60, *supra,* is an "adopted" statute, while Section 1, Title 75, *supra,* is an "original" statute, as defined in Section 8147, Revised Laws of 1910, now Section 11, Title 75, O. S. A. 1951, which reads as follows:

"*Statutes Defined.* The statutes of Oklahoma are hereby defined to be:

"*First*: Original acts enacted by the Legislature.

"*Second*: Statutes taken from other sources and adopted and enacted by the Legislature as statutes of this State."

Under the plain language of Section 8148, Revised Laws of 1910, now Section 12, Title 75, O. S. A. 1951, which reads as follows:

"*Original Acts Shall Govern.* In all cases where there is in anywise a conflict between the original acts and adopted statutes, the original acts shall govern, and the adopted statutes shall be deemed as repealed, amended or modified thereby, without reference to the date of the approval of such original acts."

any conflict between Section 1, Title 75, *supra,* and Section 335, Title 60, *supra,* as to vested rights and for protection must be resolved in favor of Section 1, Title 75.

The Court of Appeals, in its opinion, in construing Section 1, Title 75, *supra,* copied only the first proviso (T. R. 11) and relied upon the same for its statement that the entire Section 1, Title 75, *supra,* dealt only with navigable streams. The above opinion would be correct were it not for the enacting clause of Section 1 and the second proviso which have for their purpose, under the plain language

thereof, the protection of the owners of all riparian rights abutting on banks of *any* stream or bed of stream within the State of Oklahoma.

We directed the Court's attention in our petition for rehearing (T. R. 28-30) to the fact that the Court had overlooked and failed to construe the second proviso, and the force and effect of the same. It must be apparent that the force and effect of Section 1, Title 75, *supra,* cannot be correctly determined and ascertained without giving some consideration to the second proviso. It is also apparent under the holding of this Court in *Brewer-Elliott Oil & Gas Co.* v. *U. S., supra,* that patents issued prior to statehood vested title in the patentees, predecessors in title, to the center of said stream, and that said title vested prior to statehood. The force and effect of the above second proviso to Section 1, Title 75, *supra,* was to protect that right at least in so far as it related to the oil, gas, minerals and other substances designated in the aforesaid proviso.

It follows, the Court of Appeals has by its opinion construed the force and effect of the aforesaid act of the legislature of Section 1, Title 75, *supra,*

(*a*) by omitting any reference to the second proviso contrary to and in conflict with the general rule that in construing statutes the intent of the legislature must be ascertained by considering all of the various provisions of its enactment upon any particular subject; *State, ex rel. Commissioner of Land Office* v. *Phillips Petroleum Company,* 258 P. 2d 1193.

(*b*) by omitting any reference to the second proviso, which has for its purpose the limitation of the force and effect of Section 335, Title 60, *supra,* as contained in said second proviso to Section 1, Title 75, *supra,* protecting vested rights.

(*c*) by omitting any reference to the second proviso the Court has placed a construction upon the state statute, to-wit, Section 335, as being effective to destroy vested rights accrued under a Federal grant issued prior to statehood, and, therefore, violative of the 5th and 14th Amendments of the U. S. Constitution, as held in *Choate* v. *Trapps, supra,* and as announced by this Court in *Brewer-Elliott Oil and Gas Company* v. *U. S., supra,* and *Alladin Petroleum Company* v. *State, supra.*

(6) *State, ex rel.,* v. *Warden,* 198 P. 2d 402, relied upon by the Court of Appeals, neither refers to, nor modifies, nor overrules the law of accretions as announced in *Hunzicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra.*

It is apparent the Court in *State, ex rel.,* v. *Warden, supra,* did not refer to the case of *Hunzicker* v. *Kleeden,* and *Mapes* v. *Neustadt* for the reason the facts therein were so materially different. The law announced in said cases did not apply to the controversy in *State, ex rel.,* v. *Warden.* The Court in *State, ex rel.,* v. *Warden,* did recognize the following rules applicable in construing Trust Patents bordering on a non-navigable stream, to-wit: (*a*) that a Federal grant issued prior to statehood conveys to the riparian grantee title to the center of the stream; (*b*) that an act of the legislature is ineffective to disturb the title of the riparian owner which passed under Federal grant executed prior to statehood.

It would seem that said statement is inconsistent with the following statement contained in *State, ex rel.,* v. *Warden,* and quoted by the Court of Appeals as follows:

"It is an established rule that where a non-naviga-

gable stream is made the boundary, then it is the center of the stream that constitutes the boundary, and that apart from changes due to avulsion the boundary continues therein and shifts with the current thereof." The above statement is taken from the case of *Braddock* v. *Wilkins*, 182 Okl. 5, 75 P. 2d 1139. In that case the grantee had mortgaged tracts of land that had been patented as Lots 1 and 2, bordering on the Red River. The land was mortgaged and described as Lots 1 and 2 and the mortgage was foreclosed. The mortgagor executed a deed to what was described as accretions to Lots 1 and 2 between the boundaries of the lots as surveyed and the present water channel of the Red River. The only question was whether the mortgage to Lots 1 and 2 included the bed of the river. The Court in *Braddock* v. *Wilkins* held the patent extended to the center of the stream and quoted from *Jeffries* v. *East Omaha Land Company*, 134 U. S. 178, 10 S. Ct. 518-523, wherein the land involved was surveyed as Lot 4 in 1851, however, it was not patented until 1855, during which time there had been a great change in the side lines of the stream. In the above cited case the court held the date of the patent governed and controlled as to the center of the stream, and that all deeds made thereafter conveyed not only what was originally Lot 4 but all accretions thereto. That the title vests as of the date of the patent is supported by the case of *Oklahoma* v. *State of Texas*, 258 U. S. 574, 42 S. Ct. 406-415. In that case the Red River was surveyed and platted in 1874 and 1875. Afterwards, and before the patents were issued, a portion of the banks had been swept away in times of flood and when the patents were issued several tracts had become part of the bed of the stream. The court in discussing the force and effect of the change in the banks of the stream stated:

"Evidently the disposal (referring to patents) was intended to operate and have effect as if the tracts retained their former relation to the river, and, as nothing stood in the way, we think the title under the disposal reached to the middle of the stream.

"We think the right to the bed and to the center line passed with the tracts which had come to be riparian, but, where there was a prior disposal of the tracts in the bed, that tract, as just indicated, went with them."

The court herein in its opinion uses the following language:

"Had the patent conveyed Lot 7 to the center of the stream, as established by the survey of 1872, we would have a fixed line which might bring the case within the *Hunzicker* decision."

The same contention was made in *Braddock* v. *Wilkins*. In that case the patent in conveying the land did not contain the words "according to the government survey." It is therefore contended that the government survey is not controlling. The Supreme Court of Oklahoma in disposing of that question stated:

"It is noted that the description in the mortgage (as the patent in the case herein) does not contain the words, 'according to the government survey'; however, the lot numbers are used as established by the government survey."

It seems unsound to assert that a government patent issue to a tract of land described as Lot 7, which had, by the government been platted and surveyed as Lot 7, did not without so stating fix the boundary as fixed by the survey. If not, there would be no way of identifying Lot 7.

In the case of *State, ex rel.*, v. *Warden*, there were several surveys as to the tracts which were introduced. There

was introduced a survey of 1872, being a U. S. survey of the stream, the 1899 U. S. survey of the meander lines of the south bank, a 1929 unofficial survey of the bank, and two surveys made in 1946, one at the instance of the plaintiff and one at the instance of the defendant. The court in referring to the surveys stated:

> "Official U. S. survey * * * imparts a verity, and short of obvious mistake or probable fraud, which would entitle the government to recall its survey and have a correction by the court, is to be considered."

It appears the land involved therein was an island. The court in passing on it stated:

> "An island not otherwise appropriated, lying north of the medial line of a non-navigable stream, belongs to the owner of the north bank, whose title extends to the middle of the stream, and its existence does not alter the rule where, as here, the boundary is midway between the cut banks."

(7) The opinion based solely on the state's statute has divested petitioners of title without compensation to 9.83 acres of land traced to government grant issued prior to statehood and valued in excess of $3,000.00 and involves:

(a) *All property owners and especially all riparian owners in the right guaranteed to them to hold property under the Fifth and Fourteenth Amendments of the United States.*

(b) *Whether rights vested under a Federal grant issued prior to statehood can be impaired, divested or enlarged by State Statute.*

The above questions are of such nation wide importance

the same should be reviewed by this Court before the same should become final.

(1) The opinion, if permitted to stand, will become controlling and in effect destroy petitioner's title to all of that portion of Lot 7 lying south of Lot 8 without compensation, and will further destroy the stability of the title of all lands bordering on Salt Fork as Appendix B attached hereto which reveals that said stream almost without exception does not follow its course as originally surveyed.

(2) The opinion, if permitted to stand, will further destroy the stability of the title of riparian owners throughout the State of Oklahoma as it is a matter of common knowledge that the erosions and changes of course of the Salt Fork are common to the other rivers such as the Arkansas, the Cimarron, the North and South Canadian, the Red which cross Oklahoma. All of the lands bordering on said streams have been platted by Government Survey, and in accordance with said Survey patents have been issued. In many instances Trust Patents to Indian allottees. Lessees of the Patentee or their successors in title relying upon the former decision of this Court and the Courts of Appeals of the Eighth and Tenth Circuit holding that such patent vested title in the patentee and his successors in title to the center of the stream, and that said title when once vested cannot either be impaired, divested, or enlarged by State Statute, have, at great expense drilled oil wells on the respective sides of the center of said streams as shown by the Government Survey. Some of the wells which were originally drilled on the banks of the streams are now located in the bed thereof. This fact is well demonstrated by Appendix B, attached hereto, which shows the change that the

Salt Fork has made over the years. If, as the opinion herein has held, the Fifth and Fourteenth Amendments to the Constitution of the United States, and the former decision of this Court and the Statute of the State of Oklahoma (Section 1, Title 75, *supra*) do not protect the rights vested under said patents in the oil and gas, a great flood of litigation will arise and what were once deemed settled, stable, and merchantable titles will become unmerchantable as a result of the opinion herein, and vested rights of those relying on the former decision of this Court will be jeopardized, if not lost. Such a result would be so inequitable, unjust and contrary to rules of American jurisprudence as to shock the conscience of the court.

(3) The opinion herein is of further general importance by reason of the statement in the opinion, "The Government intervened to protect the restricted Indian's rights." The record reflects no rights of the restricted Indian's title to Lot 9 were questioned, nor did anyone seek to impair her title to Lot 9. On the contrary, the government, relying upon a State Statute seeks not only to enlarge the grant of Rosalind No Ear to include the aforesaid 9.83 acres of land admittedly not within the exterior boundary of Lot 9 as fixed by Government Survey of 1872, but divest petitions of 9.83 acres of Lot 7 readily susceptible of identification by Government Survey, and without compensation, and to vest the same in Rosalind No Ear.

The above position of the government seeking to enlarge the grant of Rosalind No Ear is in apparent conflict with the position heretofore taken in protecting Indian trusts. In the former decisions of this Court, and in the 8th and 10th Circuits, it has assumed the position, and been sustained by the above courts, as to the following principles of law, to-wit:

(*a*) A government trust patent at the date thereof, issued prior to statehood, vests a fee title not only to the upland but to the center of a non-navigable stream, which is a valuable right.

(*b*) When said title is once vested in the center of the stream, no state statute is effective to impair disturb the title, or the free use thereof, or to enlarge the grant.

The government herein, based upon a state statute, contrary to the above decisions, seeks to enlarge the grant to Lot 9 to include 9.83 acres of Lot 7, valued as aforesaid, to Rosalind No Ear, although not within the exterior boundaries of Lot 9 as fixed by the government survey.

Appendix B attached hereto discloses the changes that have taken place in the course of the Salt Fork since the original survey of 1872. If the opinion herein is permitted to stand the government will be compelled to participate in other litigation which will naturally arise as the result of said changes, and to follow the law announced in said opinion and permit the lands granted to other Indian trust patentees to be diminished under facts similar to those in the case at bar, as it will be clear that if grants of the government can be enlarged pursuant to state statute, it would certainly be inconsistent to hold that the same grants could not likewise be diminished thereby.

Conclusion.

The decision herein in destroying wthout compensation petitioners' title to 9.83 acres of land, valued in excess of $3,000.00, which title is traced to government patent, appears so inequitable, drastic and unjust as to compel this Court to accept jurisdiction to review the same. These inequities and injustices are even more pronounced when

considered with that fact that the opinion has vested the title to said 9.83 acres in the owners of a Federal grant which admittedly did not describe or include any of said land.

The opinion herein is in direct conflict with the former decisions of this Court and of inferior Federal courts and the Supreme Court of Oklahoma, upon which riparian titles throughout the state are based, and has therefore destroyed the stability of said titles which is all the more reason why the writ should be granted.

The opinion herein has taken the private property of the petitioners without compensation in reliance upon a state statute and this Court should therefore assume jurisdiction to determine whether such a statute is not violative of the rights guaranteed thereunder by the 5th and 14th Amendments of the Constitution of the United States.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

"Appendix A."

Opinion of the Court of Appeals Omitting Opening Formalities.

HUXMAN, Circuit Judge.

This was an action by the appellees against appellants to quiet their title to a tract of land in Kay County, Oklahoma. The specific land in controversy is a tract which plaintiffs claim has become a part of Lot 9 owned by them by accretion. Danube McFarlin and Mamie Sue McFarlin alleged ownership of the fee title, other than a one-half interest in the mineral rights which it was asserted vested in Rosalind No Ear, a restricted Indian, for a period of fifteen years. The Government intervened in order to protect the restricted Indian's interest. It is alleged the defendants, R. L. Tayloe and Dave Morgan, doing business as Dave Morgan Oil Company, owned an oil and gas leasehold interest on Lot 9. The complaint alleged that the remaining defendants assert adverse title and interest in and to Lot 7, all of which claims are unfounded.[1]

The litigation arose out of these facts: By Patent dated October 12, 1895, the United States conveyed to Grover Story Teller, a restricted Indian, Lot 7 of Section 30 in the Southeast Fourth of the Northeast Fourth and Lot 3 of Section 29, Township 5 North, Range 1 East of the Indian Meridian, in Oklahoma Territory; by like Patent dated

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1. This allegation standing alone is somewhat confusing. Plaintiffs do not deny defendant's title to what remains of Lot 7 but deny their ownership of that part of Lot 7 which they assert has become a part of Lot 9 by accretion.

March 19, 1906, the Government conveyed to Rosalind No Ear Lots 6, 9 and 10 in Section 30, Township 5 North, Range I East of the Indian Meridian. Only Lots 7 and 9 are involved in this litigation and the remaining real estate may be disregarded. The Court found, and its finding is not disputed, that according to the Government survey of September 16, 1872, Lot 9 was shown to be in the South Half of the Northeast Quarter of Section 30, and was bounded on the south and east side by the Salt Fork Branch of the Arkansas River; that Lot 7 was shown to be in the East Half of the Northeast Quarter of Section 30 and was bounded on the north by the same stream. The Court further found that the Salt Fork Branch of the Arkansas River was a non-navigable stream. It is without dispute that at all times from the date of that survey and continuing to the date of this suit both lots continued to remain riparian in that they are bounded, the one on the south and the other on the north by the Salt Fork Branch of the Arkansas River. The Court found that the outward surge of the river at all times was to the south and in an easterly direction; that this has caused a gradual imperceptible and continuous wearing and washing away of the sands and soil, resulting in an extension of the river bed to the south and east; that at the same time by gradual alluvion and reliction soil has been accumulated to the north bank of the stream and that this process was so gradual that it was impossible to judge what was added at any moment of time; that by the foregoing described process of nature the course of the stream at the time of trial was far removed to the south and east from its position in 1872 to where Lot 9 has been extended to include a substantial portion of Lot 7. In Finding No. 18 the Court found the amount of this accretion. It is this added land from Lot 7 to Lot 9 which is in issue in this

case. The Court quieted the title and interest of the plaintiffs and of R. L. Tayloe and Dave Morgan, doing business as Dave Morgan Oil Company, and of Rosalind No Ear, to this tract as constituting a part of Tract 9 by accretion.

We think the Court's finding that the addition of land to Lot 9, from the gradual movement of the river to the south and east, resulted from accretion is well supported by the record. In fact, throughout most of the trial, appellants conceded this. At the beginning of the trial in a colloquy between Court and Counsel, the Court asked Appellants' Counsel, "Now, I understood, Judge, that it was accretion?", to which Counsel replied, "We will agree that it was accretion, but we have plead in there the question of what caused it." And again by the Court "* * * I thought you had admitted there was accretion. I am sure you did at the time," to which Counsel replied, "I admit that it is accretion. But * * *." Counsel then advanced his reason why appellants were not entitled to prevail, conceding that the land in question was accreted land. The decision will, therefore, be predicated upon the finding that the land in controversy was accreted to Lot 9.

Oklahoma adheres to common law that accretions become the property of the owner of the adjoining land.[2] Appellants, while conceding this, contend that the general law of accretion does not apply to the facts of this case. It is their contention that the Patent of October 12, 1895, conveyed to Grover Story Keller a definite tract of land and fixed the north boundary of Lot 7 at the center of the Salt

2. 60 O.S.A. 335."Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank subject to any existing right of way over the bank. R. L. 1910, 6750."

Fork Branch of the Arkansas River, as established by the survey of 1872, and that this boundary remained unaffected by the subsequent changes in the river. Error is predicated on the Court's refusal to so hold.

Appellants rely on a line of cases in which Oklahoma has held that where riparian land because of inroads of a river is lost by erosion or submersion, but through subsequent changes of the river the water disappears and the land re-appears and the boundaries are susceptible of being definitely identified, title to the restored land is vested in the owner of the fee at the time the erosion or submersion occurred.[3] In the Hunzicker case, plaintiff owned a platted lot, the boundaries of which were fixed and established by a survey and made a matter of record. Plaintiff's property did not reach to the river and there was an intervening tract separately owned. By erosion, the river cut away this tract so that plaintiff's lot became riparian. When the river thereafter receded, re-establishing this independently owned tract, plaintiff's claim of ownership thereof by accretion was rejected because the Court held that plaintiff's boundary line was a fixed and established line which could at all times be established by mere measurement. The Court held that under these facts it would not apply the general law of accretion. The Court was careful, however, to point out that its decision was limited to the facts of that case. Thus the Court said, "Without holding that, in all cases where land has been carried away or submerged by the action of the water in a lake or river and afterwards restored by the action of such water, such land belongs to the original owner thereof, we can see no reason, in justice or equity, why the land involved in this case, after it has

3. *Hunsicker* v. *Kleeden*, 17 P. 2d 384; *Mapes* v. *Neustadt*, 173 P. 2d 442.

been restored by the river, should be given to respondent merely because the river had at some time touched her land."

But here we have no definitely fixed or established lines which can be ascertained at all times. Had the Patent conveyed Lot 7 to the center of the stream, as established by the survey of 1872, we would have a fixed line which might bring the case within the *Hunsicker* decision. There would still, however, remain the question whether it would be required that the river recede and that the land in dispute reappear on the same side of the stream with the remainder of Lot 7.

Neither do the cases of *United States* v. *Elliott*, 131 F. 2d 720; *United States* v. *Champlin Refining Company*, 156 F. 2d 769; and *Choctaw and Chickasaw Nations* v. *Seay*, 235 F. 2d 30, by our Court support appellants' position. None of them involved accreted land. They all involved the ownership of the bed of non-navigable rivers and the question in each was whether the grantor intended to reserve from the deed of conveyance of land bordering on such stream his admitted ownership of the land in the bed of the river.

Appellants make the contention that the judgment of the Court is in conflict with Section 1, Title 75, O. S. 1951. The argument is somewhat difficult of comprehension. Appellants contend that Section 1, Title 75, modifies or abridges Section 335. As far as we can glean, Title 75, O. S. 1951 dealt with the codification of the laws of Oklahoma. The portion of Section 1, Title 75, which it is claimed modifies the law of accretion reads as follows: "* * * provided that Section 6639 of the Revised Laws, being a provision

defining the rights of the owners of land abutting upon navigable waters, shall not be adopted or become a part of said revised laws under the provisions of this act; * * *" Appellants' contention seems never to have been considered by the Oklahoma Courts. It is sufficient, in our view, to say that whatever its meaning may be, it applies by its express terminology only to navigable waters and, therefore, can have no application to riparian rights on non-navigable streams.

In the late case of *State* v. *Warden*, 198 P. 2d 402, the Oklahoma Court reaffirms its adherence to the general law of accretion. It said: "It is an established rule that where a non-navigable stream is made the boundary it is the center of the stream that constitutes the boundary and that apart from changes due to avulsion the boundary continues therein and shifts with the current thereof." It is our conclusion from a consideration of the Oklahoma cases that, aside from factual situations similar to those set out in the *Hunzicker* case, Oklahoma adheres to the general law of accretion as evidenced by 60 O. S. A. 335, set out in footnote 2.

Appellants' contention that the application of the Oklahoma law of accretion constitutes a violation of the Fifth Amendment is not well taken. The facts in the cases cited to support this contention distinguish them from the facts in this case. Because of the nature of the grants in this case, the grantees took to the center of the stream and it remained their boundary at all times. When the center of the stream shifted, the boundary to their tracts shifted with it.

We think the Court correctly concluded that 60 O. S. A. 335, the Oklahoma law of accretion, controlled the disposition of this case, and its judgment is, therefore, *affirmed.*

DANUBE MC FARLIN

VIOLA VANSELIUS, etal.

LIZZIE GIVES WATER

DANUBE MC FARLIN

LIZZIE GIVES WATER "A"

LOT 10
25.67 A

LOT 8
32.8 A

NO EAR
LOT 9
11.82 A.

12.62 Ac.

6.3 Ac.

LOT 5
28.05A

1.67Ac.

CENTERLINE

SALT FORK

RIVER

SEPTEMBER 1871

U.S. Gov. Meander Line

15.81 Ac

LOT 6
12.48 A.

9.83 Ac.

23.34 Ac

LOT 7
30.70 A.

30

2472.55'

JNO. CAUGHLIN

Legend
Accreted Acres Shown Thus 9.83 Ac.

APPENDIX "B"

A VANSELIUS, etal.

LIZZIE GIVES WATER

S. M. BOETTCHER

IUBE MC FARLIN

LIZZIE GIVES WATER "A"

LITTLE COOK "A"

LOT 1
14.25 A

LOT 8
32.8 A

6.84 Ac.

14.63 Ac.

L.H. WENTZ
LOT 11
13.36 A.

1.85Ac.

4.27Ac.

NO EAR
LOT 9
11.82 A.

6.3 Ac.

SEPTEMBER 1871

U.S. Gov. Meander Line

Low Water Line

23.34 Ac.

LOT 7
30.70 A.

15.81 Ac

LOT 6
12.48 A.

9.83 Ac.

SALT FORK

RIVER

JANUARY 1956

CENTERLINE

2472.55'

d Acres Shown Thus 9.83 Ac.

PENDIX "B"

I, Fred G. Fellows, a Registered Professional Engine
certify that under my direction the courses and
have been calculated on the centerline betwee
lines as determined by the U.S. Land Office sur
1871 of the Salt Fork of the Arkansas Rive
centerline between meander lines of the
of January 1956 made by the County Sur
Kay County, Oklahoma and I have therefro
the accretions accruing to Lot 1, Section 29 an
30, Township 25, North, Range 1 East, Indian
Meridian, Kay County, Oklahoma acc
the rule cited by the Supreme Cou of t
Oklahoma for dividing land found to be
as stated in Goins v. Merryman 183 Okla. 1
All courses, distances and acreage are as

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No. 712

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In the Supreme Court of the United States

October Term, 1957.

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation,
Petitioners,

vs.

DANUBE McFARLIN, MAMIE SUE McFARLIN, DAVE MORGAN, doing business as DAVE MORGAN OIL COMPANY, R. L. TAYLOE, ROSALIND NO EAR, and THE BUREAU of INDIAN AFFAIRS of the DEPARTMENT of INTERIOR of the UNITED STATES of AMERICA,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF TO RESPONDENTS OPPOSITION TO GRANTING THE WRIT.

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IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1957

No. 712

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation,
Petitioners,
vs.
DANUBE McFARLIN, MAMIE SUE McFARLIN, DAVE MORGAN, doing business as DAVE MORGAN OIL COMPANY, R. L. TAYLOE, ROSALIND NO EAR, and THE BUREAU of INDIAN AFFAIRS of the DEPARTMENT of INTERIOR of the UNITED STATES of AMERICA,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF TO RESPONDENTS OPPOSITION TO GRANTING THE WRIT.

Statement.

The United States for and on behalf of Rosalind No Ear, a restricted Indian, has filed a response opposing the granting of the writ herein and seeking to uphold the judgments of the lower courts based upon Section 335, Title 60, O. S. A. 1951, which have divested and destroyed the title of petitioners traced to a government patent issued prior to statehood to 9.83 acres of Lot 7 valued in excess of $3,000.00 without compensation, and quieting title to one-half of the minerals therein in Rosalind No Ear, allottee of Lot 9, despite the fact that said 9.83 acres is admittedly not

within the exterior boundaries of Lot 9 as fixed by the government survey. It is apparent that a proper determination of the correctness of the judgment cannot be ascertained without a determination of the following questions:

(1) Is the construction of the aforesaid state statute relating to accretion governed by the decisions of the Supreme Court of the State of Oklahoma?

(2) Did the patent, issued prior to statehood, to the aforesaid lots, bordering upon a nonnavigable stream convey title to each grantee to the center of said stream?

(3) If so, is the title so granted to the center of the stream a valuable right protected by the 5th and 14th amendments of the United States Constitution?

(4) Do the Oklahoma decisions modify the common law as to riparian rights under facts applicable to what has been designated the "Doctrine of submergence and reappearing of land" where the same is capable of being identified by government survey?

We now refer to the above propositions in the order above stated.

(1) The respondent, the United States, in its opposition briefs by citing *Bryan* v. *Chicago Mill and Lbr. Co.*, (C. A. 8, Ark.) 216 F. 2d 727, and *Anderson-Tully Co.* v. *Tingle,* (C. A. 5, Miss.) 166 F. 2d 224, recognizes the general rule that riparian rights upon nonnavigable streams and the law of accretion applicable thereto are governed and controlled by the applicable local law and the decisions of the Supreme Court of the state construing the same.

While the foregoing is a well established rule it is subject to an equally well established qualification, that in dealing with the general subject of beds of streams neither the courts, nor the legislature may adopt a retroactive rule pertaining thereto or adopt any rule or statute which would impair the efficacy of the grant or the use and enjoyment of the property granted. See *Packer* v. *Byrd, et al.*, 137 U. S. 661, 11 S. Ct. 210, 211; *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, (C. A. 8) 270 Fed. 100, 109, affirmed 260 U. S. 77, 43 S. Ct. 60, 64; *U. S.* v. *Champlin Refining Company,* 156 F. 2d 769, affirmed 331 U. S. 788, 67 S. Ct. 1346; and *Alladin Petroleum Co.* v. *State,* 200 Okl. 134, 191 P. 2d 224.

It must be apparent the court below in divesting petitioners of valuable property, a part of which was the river bed and a part upland, traced to a government patent dated October 12, 1895, based upon a state statute has adopted a retroactive rule and therefore in conflict with the authorities above cited.

(2) It is also a well established rule by the state and federal courts of this jurisdiction and this Court that an Indian trust patent issued prior to statehood vests in the patentee not only title to the upland but to the center of the nonnavigable stream. See *Brewer-Elliott Oil and Gas Co.* v. *U. S., supra; U. S.* v. *Elliott,* (10th Circuit), 131 F. 2d 720; *U. S.* v. *Champlin Refining Company,* (10th Circuit) *supra; Hunzicker* v. *Kleeden,* 161 Okl. 102, 17 P. 2d 384; and *Alladin Petroleum Co.* v. *State, supra.*

The respondents do not controvert the above principle of law nor did the courts below, but they sought to circumvent the force and effect of the same by the statement that

said rule had no application, without the citation of any authorities to support said statement.

(3) It must be apparent that before a court can deprive one of a property right vested under federal grant issued prior to statehood, consideration must be given to the source of his title. Such was the holding of this Court in *Choate* v. *Trapp,* 224 U. S. 665, 32 S. Ct. 565. The holding of the lower courts that the source of the title was immaterial or had no application when seeking to deprive one of rights and incidents of title vested under federal grant is error and in conflict with the above decisions.

(4) On page 13 of our original petition we stated our 4th reason for granting the writ as follows:

> "The Supreme Court of Oklahoma in *Hunzicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra,* has modified the common law of accretion and the force, effect and application of Section 335, Title 60, pursuant to Section 2, Title 12, O. S. 1951;"

and discussed said reason (pages 13-19). We desire to supplement the same by directing the Court's attention to the opinion of this Court in *State of Arkansas* v. *State of Tennessee,* 246 U. S. 158, 38 S. Ct. 301, 305, wherein the Court in discussing the various conflicting rules adhered to by the various stated, referred to what it designated as "The Doctrine of Submergence and Reappearance of Land," defined in *Mulry* v. *Norton,* 100 N. Y. 424, 3 N. E. 583, and quoted therefrom as to the factual situation in which the same was applicable as follows:

> "Land lost by submergence may be regained by reliction, and its disappearance by erosion may be re-

> turned by accretion, upon which the ownership temporarily lost will be regained. * * * that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners."

We direct the Court's attention to the fact that the courts uniformly hold under the above rule that it is immaterial whether the land once submerged has been restored by accretion, avulsion, or by artificial means, or regardless of the means of restoration it still remains the property of the original owner. The Court in *Hunzicker* v. *Kleeden, supra,* cited *Mulry* v. *Norton, supra; Assoc.* v. *Shrivner,* 64 N. J. Law 550, 46 Atl. 690; *Stockley* v. *Cissna,* (C. A. 5) 119 Fed. 812, 813; *Keel* v. *Sutton,* 142 Tenn. 341, 219 S. W. 351, 353, and *City of St. Louis* v. *Rutz,* 138 U. S. 226, 11 S. Ct. 337, 346, all of which involve a factual situation where the land had been submerged and reappeared. In syllabi 3 and 4 the Court stated the law and facts which bring the same within the rule designated by this Court in *State of Arkansas* v. *State of Tennessee, supra,* as constituting "The Doctrine of Submergence and Reappearing of Land."

The Supreme Court of Oklahoma adhered to said rule under a similar state of facts in *Mapes* v. *Neustadt, supra,* and the Court of Appeals of the 10th Circuit in *Herron* v. *Choctaw-Chickasaw Nations,* 228 F. 2d 830, from which we quoted in our petition (p. 18), recognized said rule as the settled law in Oklahoma.

We have just received a copy of the reply brief from the remaining respondents in which they cite two cases which we believe should be referred to.

The first case is *Goins* v. *Merryman,* 183 Okl. 157, 80 P. 2d 268. The factual situation therein is different from that involved herein. However, said case was cited and relied upon in *Mapes* v. *Neustadt, supra,* and the Supreme Court of Oklahoma refused to follow the same but adhered to the "Doctrine of Submergence and Reappearing of Land."

The second case is *Littlefield* v. *Nelson,* (C. A. 10) 246 F. 2d 956. The land involved was situated within the State of Oklahoma at a point on the Arkansas River which the parties agreed was navigable. The facts as disclosed by the opinion did not involve land patented from the federal government prior to statehood nor did it involve land which had been submerged and by the water receding had reappeared and was subject to identification and therefore said case was not within the purview of the rule announced in *Hunzicker* v. *Kleeden, supra,* nor was that case cited or referred to in the opinion.

The remaining respondents in their reply brief cite several other Oklahoma cases and cases from the federal courts. However, in none of said cases was the factual situation such as to bring it within the "Doctrine of Submergence and Reappearing of land."

The remaining respondents take the position stated on page 4 of their brief, to-wit:

> "The time and nature of the issuance of the patent without reservations whether trust or otherwise to petitioner's Lot 7 before Oklahoma became a state does not eliminate it from the Law of Accretions, whether it be the common law or later the statutory law based upon the common law."

While it is not clear it would appear that counsel contends that when the federal government prior to statehood issues a patent to land bordering on a nonnavigable stream it does not convey title to the center of the stream as it then exists but only a floating and shifting title that can be impaired or destroyed by the adherence of the state to the common law or by a state statute. If this is counsel's contention the same is in direct conflict with the law announced in *Brewer-Elliott Oil and Gas Co.* v. *U. S., supra,* and other cases heretofore cited to the effect that no state statute can impair or divest title traced to a government patent issued prior to statehood.

This Court in *City of St. Louis* v. *Rutz, supra,* had before it a controversy between the City of St. Louis and a citizen of Illinois as to riparian rights on the Mississippi River the center of which was the dividing line between the states. The court held it was impossible for the owner of land on the west side of the middle of the stream to extend his ownership by accretion to land on the other side of the center situated in the State of Illinois, the title to which was vested by the State of Illinois in the riparian owner. By application of the same rule it would seem when the government has issued its patent to a tract of land to the center of the stream prior to statehood as long as the center can be identified neither of the parties on either side of the center fixed by government survey could claim accretion to the land beyond that fixed by their government grants.

CONCLUSION.

(1) We submit the Supreme Court of Oklahoma is construing riparian rights and Section 335, Title 60, O. S. 1951, in *Hunzicker* v. *Kleeden, supra; Mapes* v. *Neustadt, supra,* and the Court of Appeals of the 10th Circuit in *Herron* v. *Choctaw-Chickasaw Nations, supra,* have, without designating the same by name, followed and applied "The Doctrine of Submergence and Reappearance of Land," as defined by this Court in *State of Arkansas* v. *State of Tennessee, supra,* to cases where the boundary can be definitely ascertained by reverence to government plat and survey. The opinion herein has disregarded said doctrine under factual situations not materially different and applied the common law in direct conflict with the Oklahoma decisions. Thus upon facts not materially different we have the Supreme Court of Oklahoma adhering to "The Doctrine of Submergence and Reappearance of Land," and under a similar state of facts the opinion herein applying the common law and thereby deprived petitioners of 9.83 acres of land valued in excess of $3,000.00, creating a conflict between the decisions of the state courts and the circuit court of appeals, and causing such confusion that this Court should assume jurisdiction.

(2) We submit the opinion is in conflict with the law announced by the Supreme Court of Oklahoma in *Alladin Petroleum Co.* v. *State, supra,* and the decisions of this Court in *Brewer-Elliott Oil and Gas Company* v. *U. S., supra, Champlin Refining Co.* v. *U. S., supra,* and *Choate* v. *Trapp, supra,* holding that no state statute is valid which

seeks to impair or divest title traced to a government patent prior to statehood and therefore violative of the 5th and 14th amendments of the United States Constitution.

(3) We further submit that neither *Goins* v. *Merryman*, 183 Okl. 157, 80 P. 2d 268; *State, ex rel.*, v. *Worden*, 200 Okl. 613, 198 P. 2d 402; *Braddock* v. *Wilkins*, 182 Okl. 5, 75 Pac. 1139; *Criswell* v. *Wilson*, 198 Okl. 47, 175 Pac. 87; *Chase* v. *Cheatham*, 194 Okl. 1, 146 P. 2d 585, nor *Littlefield* v. *Nelson*, (C. C. A. 10) 246 F. 2d 956, involve a factual situation where the doctrine of submergence and reappearance would be applicable nor did the Court in said decisions or either of them refer to the case of *Hunzicker* v. *Kleeden*, *supra*, or *Mapes* v. *Neustadt*, *supra*, or attempt to overrule them. The respondents have not cited a single instance in which this Court has failed to apply the doctrine of submergence and reappearance of land as set forth in *Arkansas* v. *Tennessee*, *supra*, to a factual situation similar to the case at bar.

(4) The opinion below in citing *Goins* v. *Merryman*, *supra*, overlooks the fact that the Supreme Court of Oklahoma in *Mapes* v. *Neustadt*, *supra*, refused to follow or apply the decision therein under a factual situation similar to the facts herein, but applied "The Doctrine of Submergence and Reappearance of Land."

(5) Clearly the opinion in giving and vesting the title to the land involved herein in the respondents herein merely because the river had at one time touched their land, no part of which had been impaired, and when they had all they were entitled to or in good conscience could demand under their patent is certainly not based upon equity or good conscience.

We therefore submit that for the reasons above stated and for the reasons set forth in our petition that a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF of PETITIONERS.

Petition for Rehearing of Order denying Petition for Writ of Certiorari to the Court of Appeals of the Tenth Circuit.

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I. The opinion below in the statement in the syllabi and particularly Syllabus One has placed a construction upon Title 60, O. S. 1951, Section 335, in conflict with the general rule of law announced in *Hunzicker* v. *Kleeden*, 161 Okl. 102, 17 P. 2d 384, 385; *Mapes* v. *Neustadt*, 197 Okl. 585, 173 P. 2d 442, followed in *Herron* v. *Choctaw-Chickasaw Nations*, (10th Cir.) 228 F. 2d 830 2

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IN THE SUPREME COURT OF THE UNITED STATES.
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Petition for Rehearing of Order denying Petition for Writ of Certiorari to the Court of Appeals of the Tenth Circuit.

Petitioners respectfully petition for rehearing of the order of March 3, 1958 denying their petition for writ of *certiorari* to the Court of Appeals of the Tenth Circuit.

Statement and Jurisdiction.

On January 7, 1958 there was filed pursuant to Title 28 U. S. Code, Section 1247 (3) and 2191 (c) a petition for writ of *certiorari* to the Court of Appeals of the Tenth Circuit. On March 3, 1958 this court denied that petition for writ of *certiorari*.

This petition for rehearing is filed pursuant to Rule 58 (2) of the Rules of the Supreme Court of the United States. The grounds upon which it is based are that there exists intervening circumstances of a substantial or controlling effect and that there are substantial grounds available to petitioners for granting the petition which were not previously presented for the reason at the time of preparing and filing the petition for writ of *certiorari* the syllabi of the case was not available to the petitioners as it had not been reported but is now reported in 249 F. 2d 54.

Reasons for Granting the Rehearing and the Petition.

I.

The opinion below in the statement in the syllabi and particularly syllabus one has placed a construction upon Title 60, O. S. 1951, Section 335, in conflict with the general Rule of Law announced in *Hunzicker* v. *Kleeden*, 161 Okl. 102, 17 P. 2d 384, 385, *Mapes* v. *Neustadt*, 197 Okl. 585, 173 P. 2d 442, followed in *Herron* v. *Choctaw-Chickasaw Nations*, (10th Circuit) 228 F. 2d 830.

It is admitted the stream between Lots 7 and 9 did not change its course by avulsion.

The court has demonstrated by its statement in the syllabi that that portion of Lot 7 between the bed of the river as it existed at the time of the survey and as it now exists accumulated to the North bank of the stream or to Lot 9 that it reached said conclusion by overlooking or giving no consideration to the uncontroverted fact, that before this portion of said lot could have reappeared as dry land, it must have been first submerged by the southward movement of the stream.

It follows the court by omitting any reference to the above factual situation which is uncontroverted has reached a conclusion unwarranted under the uncontroverted facts.

It further follows that if consideration had been given to the uncontroverted fact that a portion of Lot 7 once submerged had reappeared as dry land within the boundaries of said lot as fixed by the government survey thereof the court below could not have held that under Section 335, Title 60, O. S. 1951 the land involved accreted to Lot 9 but rather would have held that the same remained a part of Lot 7. The opinion under the uncontroverted facts is, therefore in direct conflict with the decision of *Hunzicker* v. *Kleeden, supra,* and the cases therein cited, to-wit: *Allard* v. *Curran,* 41 S. Dak. 73, 168 N. W. 761; *Association* v. *Schrivner,* 64 N. J. Law 550, 46 Atl. 690, 51 L. R. A. 425; *Stockley* v. *Cissna,* 119 F. 2d 812; *Keel* v. *Sutton,* 142 Tenn. 341, 219 S. W. 351; *City of St. Louis* v. *Rutz,* 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed 941, 950. The above cases are uniform in holding where a stream makes inroads upon a tract of land and the same became submerged by reason of erosion or other causes, and as the river changes its course the land of said tract reappears either by *accretion* or reliction it continues to be the property of the former owner as if no erosion or submerging occurred. See also *Herron* v. *Choctaw-Chickasaw Nations, supra.*

This court in *State of Arkansas* v. *State of Tennessee,* 346 U. S. 158, 38 S. Ct. 301, 305, in referring to the general rule of law applicable where land had been submerged and

reappeared stated the same was governed and controlled by the "Doctrine of Submergence and Reappearance of Land," and remained the property of the former owner. The opinion under the uncontroverted facts being in direct conflict with the above authorities, the rehearing should be granted and the writ of *certiorari* issue.

II.

The opinion is further erroneous and in conflict with the decisions of the Supreme Court of Oklahoma and the Court of Appeals of the Tenth Circuit in the following particulars:

(a) The opinion stated:

"But here we have no definite, fixed or established line which can be ascertained at all times."

The above statement is unsupported by evidence, facts or circumstances as there was introduced and appears in the transcript of the record (p. 3) as exhibit "A" the government survey and field notes of the survey and the government plat approved and filed in the general land office September 16, 1872, which plat and field notes attached disclose the definiteness and certainty of the boundaries of Lot 7 as containing 30.70 acres. The stream is definitely located as on the Northeast corner of Lot 7 on the South bank of said stream is an iron Post No. 11 which is 63 chains North of the Southeast corner of Sec. 30. That immediately to the North thereof on the section line is the North bank of said stream fixed by iron Post No. 21 which is 8 chains North of Post 11. The minutes and degrees that the course of the river takes to the Southwest between

that portion of Lot 9 that is immediately North of a portion of Lot 7 is shown by the field notes. There is not a line of evidence that the center of the stream as fixed by the survey and plat cannot be fixed by measurement from the plat and survey.

This court has been uniform in holding that official government plats and surveys import validity and in the absence of obvious mistakes or fraud which would cause the government to recall the same and have them corrected said plats and surveys should be so considered by the court.

See *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87, 15 S. Ct. 991; *Mitchell* v. *Smale*, 140 U. S. 406, 412, 413, 11 S. Ct. 819, 840, wherein the court quoted from *Hardin* v. *Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, as follows:

> "We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes, after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often the most valuable part of his grant. * * * to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned."

These surveys are binding except where there are plain and obvious mistakes and it is only in such cases that the government will have a right to recall a survey and have it corrected by courts or other process.

The force and effect of the above statement is to hold that the government having surveyed and platted a tract of land could not thereafter by a subsequent survey deprive the owner of what it had conveyed to him without violating the 5th amendment of the Constitution of the United States.

If the government could not deprive one of *riparian* rights by making a new survey clearly the patentees to Lot 9 could not in reliance upon a state statute make a private survey and deprive the owners of property conveyed to them by the government without violating the 5th amendment of the Constitution of the United States.

Such is the holding in *Choate* v. *Trapp*, 224 U. S. 665, 32 S. Ct. 565, wherein it is stated:

> "Under the 5th amendment * * * no statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres or 50 acres or timber growing on the land. After he accepted the patent the Indian could not be heard either at law or in equity to assert any claim to the common property. If he is bound so is the tribe and government when the patent was issued."

In the case at bar it is undisputed that the government as a party to the suit is proceeding upon a state statute and a private survey to deprive these petitioners of 9.83 acres of land, title to which is traced to a government trust patent issued prior to statehood and which petitioners and their successors in title have held since restrictions were removed in a warranty deed from the allottee September 26,

1910 and on which the petitioners and their successors have paid taxes since said date.

We submit the mere statement that the petitioners are being deprived of private property evidenced by a government trust patent dated October 12, 1895 and by conveyance from the allottee September 26, 1910 upon which they have paid the taxes since said date and of an admitted value in excess of $3,000.00, all based upon a state statute, presents a question of such substantial importance that the petition for rehearing should be granted and the writ issued to review said holding of the court.

(b) The court below makes the further statement:

> "There would still, however remain the question of whether it would be required that the river recede and the land in dispute reappear on the same side of the stream with the remainder of Lot 7."

While that question was not discussed in the opinions in *Hunsicker* v. *Kleeden, supra; Mapes* v. *Neustadt, supra,* and *Herron* v. *Choctaw-Chickasaw Nations, supra,* if the boundaries are susceptible of being definitely ascertained by government survey it is immaterial which side of the stream the land reappears on.

If it was avulsion the question would be obviously immaterial.

The court in *Herron* v. *Choctaw-Chickasaw Nations, supra,* in referring to the case of *Hunsicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra,* stated:

> "The latter case was one involving avulsion of a river but the general rule applicable to cases involving erosion or submerging of land was clearly recognized with unqualified approval."

(c) The court in its opinion further states:

"Had the patent conveyed Lot 7 to the center of the stream, as established by the survey of 1872, we would have a fixed line which might bring the case within the *Hunzicker* decision."

The above statement compounds the confusion of the opinion herein. We assume the court was holding the patent did not convey title to Lot 7 to the center of the stream which holding would be in direct conflict with *U. S.* v. *Champlin Refining Company* (10th Circuit) 156 F. 2d 769, affirmed by this court 331 U. S. 788, 67 S. Ct. 1346. In that case the court was construing a patent identical with the one in the case at bar which had conveyed "Lot 6, Section 24, Township 23 North, Range 3 East of the Indian Meridian in Oklahoma". This was a trust patent issued June 10, 1907, prior to statehood. Without reference to the survey the court in that case held that the patent "without more conveyed the title to the center of the stream". Citing in support thereof *U. S.* v. *Brewer-Elliott Oil and Gas Co.*, (8th Circuit) 270 Fed. 100; *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, 260 U. S. 77, 43 S. Ct. 60.

Clearly if the government surveys and plats a tract of land and designates it as Lot 7 and thereafter conveys it as Lot 7, it cannot be said that the patent does not refer to the survey or was not made pursuant thereto.

It is therefore clear that the reasons set forth by the court for not applying the rule followed in the *Hunzicker* case are not supported by evidence, facts, or logic, but are contrary to the decisions above cited and in direct conflict therewith and for that reason, if for no other, this court should grant the rehearing and issue the writ.

Although Propositions I. and II. above were available to petitioners at the time of the filing of the petition it was not made clear from the opinion until the same was printed with syllabi that the court founded its conclusion upon the denomination of a portion of land involved herein as "accumulated" land without reference to the uncontroverted fact that said land had by erosion and submergence and change of the course of the stream reappeared as dry land.

Conclusion.

It is apparent, as demonstrated by the syllabi, not available when the petition for the writ was prepared, that the lower court has construed Title 60, O. S. 1951, Sec. 335, in direct conflict with the decisions of the Supreme Court of Oklahoma in *Humzicker* v. *Kleeden, supra*; *Mapes* v. *Neustadt, supra*; followed and applied in *Herron* v. *Choctaw-Chickasaw Nations, supra.*

The Supreme Court of Oklahoma is committed to the rule where a nonnavigable stream makes inroads on a tract of land bordering thereon and by erosion or submergence the stream gradually makes further inroads and the eroded and submerged land gradually reappears as dry land, whether by accretion or reliction so long as the boundaries fixed by the government survey can be ascertained with reasonable certainty the title remains in the original owner as if no erosion or submergence had occurred.

Although in the instant case it is uncontroverted the nonnavigable stream had made inroads on Lot 7 by erosion and submergence and as the stream made further inroads a portion of the land of Lot 7 once submerged reappeared as dry land, the court in its opinion without referring to the submerging of the land has defined or designated the same as "accumulated" land although within the boundaries of Lot 7 as fixed by the government survey thereof the court has held under the above statute the land accumulated to Lot 9.

In view of the law announced in the syllabi above we have deemed it proper herein to refer to the reasons stated in the opinion for not following and applying the law announced in the *Hunzicker* case and point out that the same are not only unsound but that the same are in conflict with the Oklahoma decisions applicable thereto.

WHEREFORE petitioners pray for a rehearing herein and for the issuance of a writ of *certiorari* to the United States Court of Appeals for the 10th circuit.

Dated, Tulsa, Oklahoma,
March 21, 1958.

Respectfully submitted,

NEAL E. McNEILL,
Attorney for Petitioners.

Of Counsel:
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813 Midstates Bldg.
Tulsa, Oklahoma.

Certificate.

I, Neal E. McNeill, hereby certify that I am a member of the bar of the United States Supreme Court and counsel for petitioners herein; that the within petition is presented in good faith and not for delay. Said petition is restricted to "intervening circumstances of substantial effect", and "other substantial grounds available to petitioners although not previously presented", and subscribe my manuscript signature hereto.

Dated at Tulsa, Oklahoma this 21st day of March, 1958.

NEAL E. McNEILL,

Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 712

OLIN R. STONE, ET AL., PETITIONERS

v.

DANUBE MCFARLIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App., pp. 31–36) is reported at 249 F. 2d 54.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1957. A timely petition for rehearing was denied on November 29, 1957. The petition for a writ of certiorari was filed January 7, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the courts below correctly held under Oklahoma law that land accreted on a nonnavigable stream belongs to the owner of the riparian parcel to which it accreted.

STATUTES INVOLVED

Title 60, section 335, Oklahoma Statutes, 1951, defining the riparian right to accretions, and Title 75, section 1, Oklahoma Statutes, 1951, the enactment section containing certain limitational provisions, are printed in the petition at pages 4–5.

STATEMENT

Plaintiffs McFarlin, respondents herein, brought this action in the federal district court to quiet title to certain lands accreted to the north bank of the Salt Fork branch of the Arkansas River in western Oklahoma. The McFarlins hold a fee title to the uplands lying north of the Salt Fork branch and contiguous to the accreted land. McFarlins' claim to the accreted land was opposed by defendants Stone, petitioners herein, who held fee title to the lands lying south of the stream, and opposite the accreted land. The Government's interest in the case is as respondent on behalf of a restricted Indian, Rosalind No Ear, who holds a one-half interest in the mineral rights in the McFarlins' land.

The material facts, over which there is little controversy, are summarized as follows:

A government plot and survey of this area was filed in 1872. It showed Lots 7 and 9 of Section 30, Township 25 North, Range 1 East, to be riparian to, and located respectively on, the south and north banks of the Salt Fork branch, a nonnavigable stream at this point. Lot 7 was patented to a Ponca Indian in 1895, to whose interest petitioners have succeeded. Lot 9, on the other hand, was patented

to Rosalind No Ear in 1906, and to her interest respondents McFarlin have succeeded subject to the one-half mineral reservation in No Ear. Dave Morgan, and others, doing business as Dave Morgan Oil Company, hold an oil and gas lease on Lot 9.

Since the original survey, the stream has shifted in a southeasterly direction, gradually reducing petitioners' land by the process of erosion. Contemporaneously, respondents' land on the north bank has been gradually increased by deposits of earth accreted thereto by the natural processes of the stream. The trial court found these deposits to have been imperceptibly formed by accretion and not by a sudden change in the course of the river, *i. e.*, by avulsion. By 1956 this process had continued to the extent that only a small portion of Lot 7 remained south of the stream. Some 9.83 acres of accreted land, now on the north bank of the stream, are located geographically where part of Lot 7 had been in 1872.

Upon these facts the trial court held that the area in dispute constituted accreted lands, naturally formed, and belonging to the owner of the upland, Lot 9, because of its riparian position on the north bank. The trial court cited Title 60, section 335, Oklahoma Statutes, 1951, as declarative of the common law principle of accretion and dispositive of the issue of title to the accreted lands involved herein. The Court of Appeals affirmed, unanimously, holding that under well-established principles of common law as adopted by Title 60, section 335, *supra*, the accreted land belonged to the owner riparian thereto; that cases

cited by defendants were not controlling on the facts presented; and that the limiting provisions of Title 75, section 1, Okla. Stat., 1951, were inapplicable to the instant case.

ARGUMENT

1. The decision of the courts below quieting title to the accreted lands in the riparian owner contiguous thereto is clearly correct and does not involve any conflict with the decisions of this Court, the courts of appeals, or local state courts. It is well settled in common law that where a patent is bounded by a meander line of a stream, in the absence of avulsion, the stream remains the boundary no matter where it may shift. *Railroad Co.* v. *Schurmeir,* 7 Wall. 272; *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178. Where land is added by accretion it belongs to the owner riparian thereto. *St. Louis* v. *Rutz,* 138 U. S. 226; *Jones* v. *Johnston,* 18 How. 150; *New Orleans* v. *United States,* 10 Pet. 662; *Chase* v. *Cheatham,* 194 Okla. 1, 146 P. 2d 585; *Goins* v. *Merryman,* 183 Okla. 155, 80 P. 2d 268.

Decisions dealing with comparable fact situations support the holding below. *State* v. *Warden,* 200 Okla. 613, 198 P. 2d 402; *Bryant* v. *Chicago Mill & Lumber Co.,* 216 F. 2d 727 (C. A. 8); and *Anderson-Tully Co.* v. *Tingle,* 166 F. 2d 224 (C. A. 5). In each of those cases, the claimant was riparian on the bank opposite the accretions; and in denying each such claim the decisions represent complete unanimity in state as well as federal courts on the principle that

accretions belong to the *adjoining* riparian owner. In not one instance have petitioners shown a conflict of authority on the rule followed by the lower courts on the facts presented.

2. Petitioners further contend that the court below has incorrectly construed the pertinent statutes of the State of Oklahoma. Such a position is untenable. It is clear, from a reading of Title 75, section 1, that the purpose of the limitations therein was to prevent the very situation which petitioners are here attempting to bring about, *i. e.*, divesting an upland owner of his riparian rights, including that of accretion as set forth in the statutory adoption of the common law rule in Title 60, section 335. It would certainly be a violation of this statute to hold that, because of the accretion, the owners of Lot 9 on the north side of the river had lost their riparian position.

3. Finally, petitioners' assertion that the decision below violates their rights under the 5th and 14th Amendments is completely unfounded. In fact a rational analysis of the decision demonstrates that a contrary ruling would deprive *respondents* of certain vested rights as riparian owners, namely, the right to accretions deposited contiguous to their upland. It seems obvious that such a construction of a state statute defining riparian rights as to accretions cannot constitute a deprivation of property in violation of constitutional safeguards.

Petitioners' argument has not drawn in question the constitutionality of the state statutes cited *supra*. It has only been the interpretation and construction placed thereon by the courts below which has allegedly deprived petitioners of vested property rights. It is difficult to perceive in what manner petitioners could be deprived of vested rights contrary to constitutional guarantees by the courts' interpretation of a statute held to have been an adoption of the common law. It is apparent that petitioners possessed no vested rights to the accreted land, and, therefore, are divested of no rights by the decision of the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROBERT S. GRISWOLD, JR.,
ROGER P. MARQUIS,
Attorneys.

JANUARY 1958.

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In the

SUPREME COURT OF THE UNITED STATES

No. 712

OLIN R. STONE; ALDA STONE; VERA C. SMITH; FRANCIS A. MILLER; and the WOOD OIL COMPANY, a corporation,
Petitioners,

VERSUS

DANUBE McFARLIN; MAMIE SUE McFARLIN; DAVE MORGAN; DAVE MORGAN, doing business as Dave Morgan Oil Company; R. L. TAYLOE; ROSALIND NO EAR; and THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF RESPONDENTS

DANUBE McFARLIN and MAMIE SUE McFARLIN,
W. D. GREENSHIELDS,
Ponca City, Oklahoma;
CHESTER L. ARMSTRONG, JR.,
Ponca City, Oklahoma,
Their Counsel.

DAVE MORGAN; DAVE MORGAN, doing business as Dave Morgan Oil Company; and R. L. TAYLOE,
WM. W. RODGERS,
Blackwell, Oklahoma;
JOHN H. GURLEY,
Blackwell, Oklahoma;
LYNN ADAMS,
First National Bank Building.
Oklahoma City, Oklahoma
Their Counsel.

February, 1958.

FITTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. PO 9-8750

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In the
Supreme Court of the United States
OCTOBER TERM, 1957

No. 712

OLIN R. STONE; ALDA STONE; VERA C. SMITH; FRANCIS A. MILLER; and the WOOD OIL COMPANY, a corporation,
Petitioners,

VERSUS

DANUBE McFARLIN; MAMIE SUE McFARLIN; DAVE MORGAN; DAVE MORGAN, doing business as Dave Morgan Oil Company; R. L. TAYLOE; ROSALIND NO EAR; and THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF RESPONDENTS

Adoption of Co-Respondents' Brief and Arguments

Respondents herein are informed that the United States of America in behalf of Rosalind No Ear will file a brief and argument in opposition to the Petition for Writ of Certiorari. The position of the United States of America and that of the Danube McFarlin; Mamie Sue McFarlin; Dave Morgan; Dave Morgan, doing business as Dave Mor-

gan Oil Company, and R. L. Tayloe is identical with that of the United States. Therefore respondents herein do hereby adopt the brief and arguments of the United States of America in behalf of Rosalind No Ear with the same force and effect as if separately made by them and request that the same be considered in support of herein respondents' brief and argument.

DANUBE MCFARLIN and MAMIE SUE MCFARLIN,

W. D. GREENSHIELDS,
Ponca City, Oklahoma;

CHESTER L. ARMSTRONG, JR.,
Ponca City, Oklahoma,

Their Counsel.

DAVE MORGAN; DAVE MORGAN, doing business as Dave Morgan Oil Company; and R. L. TAYLOE,

WM. W. RODGERS,
Blackwell, Oklahoma;

JOHN H. GURLEY,
Blackwell, Oklahoma;

LYNN ADAMS,
First National Bank Building,
Oklahoma City, Oklahoma,

Their Counsel.

Statement of the Case in Relation to the Issues Presented by Petition for Writ of Certiorari

The findings of fact made by Judge Stephen S. Chandler, Jr., of the United States District Court for the Western District of Oklahoma, where this action originated, and the statement of the case in the opinion of Circuit Judge Walter A. Huxman of the United States Court of Appeals for the Tenth Circuit, adequately furnish this Court with the necessary facts of the case. There is no question on the facts. It was admitted that it was a clear case of accretion. Both courts, considering this case have found that Oklahoma adheres to the common law that accretions become the property of the owner of the adjoining land and rendered their orders and opinions accordingly holding that the facts presented were controlled by the Oklahoma statute 60 O.S.A. 335.

Petitioners on page 7 of their Petition under their statement of the case attempt to inject a factual issue about a dike. This issue was fully tried to the lower court and decided against them. And even if it were an issue it could not result in their favor since the trial herein the Circuit Court of Appeals for the Tenth Circuit, on July 31, 1957, in the case of *Littlefield* v. *Nelson*, reported 246 F.2d 956, has clearly held adversely to their contentions.

It may be difficult to determine what issue, if any, is presented by the Petition for Writ of Certiorari. It presents no issue concisely for this Court's consideration under Supreme Court Rule 19. However, considering the petition most generously it might be said to come under Section (b) of the Supreme Court Rule 19. If so, then the issue to be

considered here is; *has the lower United States District Court in rendering its judgment for the respondents herein, and the United States Court of Appeals for the Tenth Circuit, in affirming it decided any important state question in a way in conflict with applicable state law?* The intervention of the United States of America on behalf of the restricted Indian and fact Government land patents form the origin of the titles concerned in no way involves a question of federal law. The petitioners make no claim that the courts have decided a federal question in a way in conflict with applicable decisions of this Court. The Petition for Writ of Certiorari has failed to present any grounds for calling for an exercise of this Court's power of supervision. Considering the entire record, findings of fact, on which there is no issue, findings of law, and the opinions of the courts considering this action, showing complete exploration of all the law possibly applicable to the issues, and the many decisions of the courts of Oklahoma and the appellate courts, it is apparent that the legal issues present no controversy. The rule of law of real property as concerned with accreted lands is well settled in Oklahoma.

The time and nature of the issuance of the patent without reservation, whether trust or otherwise to petitioner's Lot 7 before Oklahoma became a state does not eliminate it from the Law of Accretions, whether it be the common law or later the statutory law based upon the common law.

Petitioners have erroneously contended throughout this action that the patent dated October 21, 1885 to Lot 7 under which they claim, in that it recites a fixed tract of land free from the operations of the law of accretions which it

common or statutory. It is not the patent but the original government survey of the land that established its location, boundaries and acres contained. The survey of 1871 supplied the basis for the subsequent issue of the patent by the government. Such land surveyed as Lot 7 may have been, more or less, at the date of the patent due to accretions. The patentee on that date received it subject to whatever decrease or enlargement it may have had due to accretions. There were no reservations in the patent (P. Tr. 15). Judge Huxman in his opinion in the case before this Court correctly disposed of the line of cases relied upon by petitioners in the following language:

> "Neither do the cases of *United States* v. *Elliott*, 131 F.2d 720, *United States* v. *Champlin Refining Company*, 156 F.2d 769, and *Choctaw and Chickasaw Nations* v. *Seay*, 235 F.2d 30, by our Court support appellants' position. None of them involved accreted land. They all involved the ownership of the bed of non-navigable rivers and the question in each was whether the grantor intended to reserve from the deed of conveyance of land bordering on such stream his admitted ownership of the land in the bed of the river."

His interpretation of such decisions is unquestionably correct. Petitioners refer to cases in the Court of Appeals of the 8th and 10th Circuits. It should be noted that the 10th Circuit was formerly the 8th. The case of *Brewer-Elliott Oil & Gas Company, et al.* v. *United States, et al.*, 249 Fed. 609; C.C.A. Appeals, 270 Fed. 100, 260 U.S. 77, relied upon by petitioners does not support them. The gist of the *Brewer-Elliott* case was that the United States when it made its grant to the Osages did so without restriction or reservation. Later when it gave to Oklahoma all navi-

igable streams, it would have given the river bed in question in the case, but when the matter became an issue the United States, not wanting to detract from the grant to the Osages, and as between the State of Oklahoma and the Osages, correctly took the position that the stream was considered non-navigable by it at the time of the grant to the Osages some 30 years before the State of Oklahoma acquired its rights. This case had nothing to do with accretions. In *Aladdin Petroleum Corporation* v. *State*, 200 Okla. 134, 191 P.2d 224, the action was by oil company lessee, Aladdin Petroleum Corporation, against the State of Oklahoma, on the relation of the School Land Commission. Aladdin claimed its interest by reason of an oil and gas lease from an abutting landowner on the south border of the Arkansas River in northern Pawnee County. Across this river to the north is Osage County. Aladdin successfully contended that its lease covered the land described in the patent and also the bed of the river to the center meander line of the Arkansas River. That the stream was non-navigable at this point and the State of Oklahoma could not have any rights in same. This case applied the same rule to riparian owners on the outside and abutting Osage lands as it did to the Osages in the *Brewer-Elliott* case hereinabove cited and discussed. The State of Oklahoma was not allowed to treat the south half of the Arkansas River as part of a navigable stream and claim ownership to it by reason of same. This case, and none of the cases referred to in it, had anything to do with the matter of acquisition of property by accretion.

The Supreme Court of Oklahoma and the United States Court of Appeals, Tenth Circuit, have uniformly held that

the issuance of the patent does not fix ownership in land free from the changes in ownership caused by accretion. The rule is well announced in *Braddock* v. *Wilkins*, 182 Okla. 5, 75 P.2d 1139, an Oklahoma case decided in 1938. The syllabus by the Oklahoma Supreme Court is as follows:

> "When a conveyance of land by lot numbers contains a stated number of acres purporting to be conveyed, which stated acreage corresponds with the acreage within the meander line as it existed at the time of the government survey, such statement of the number of acres in no way limits the extent of the grant. The water course and not the meander line is the boundary, and, although the water course shifts and establishes a new water line away from the meander line as surveyed, such water line remains the boundary, and the conveyance describing the land by lot numbers conveys the land up to such shifting line exactly as it does up to the fixed side lines of the lots, and thereby conveys all accretions that exist at the time of the execution of the conveying instrument."

The Oklahoma Court cited with approval the following decisions:

—*Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178, 10 Sup. Ct. 518, 523, 33 L. Ed. 872;

De Long v. *Olsen*, 63 Neb. 327, 88 N.W. 512;

Towell v. *Etter*, 69 Ark. 34, 59 S.W. 1096, 63 S.W. 53;

Rue v. *Oregon & W. R. Co.*, 109 Wash. 436, 186 Pac. 1074, 1077;

Tappendorff v. *Downing*, 76 Calif. 169, 18 Pac. 247.

Another Oklahoma case having to do with the patent is *Criswell* v. *Wilson*, 198 Okla 47, 175 P.2d 87 (1946). This decision was based upon *Braddock* v. *Wilkins*, *supra*, and upon *Smith* v. *Whitney*, 105 Mont. 523, 74 P.2d 450.

The United States Supreme Court Digest, Vol. 11, page 774, under Key No. 114(3), under subject of public lands Property included (in patent) well announces the rule as follows:

> "U. S. Neb. 1890. Where the official plat of the survey of government lands shows a river as one boundary of a certain lot in accordance with Rev. St. Section 2395 *et seq.*, 43 U. S. C. A. Section 751 *et seq.*, a subsequent patent for the land, describing it by number, and referring to the plat on which it is marked as containing a certain amount, and deeds describing the lot by number, pass all accretion to the lot up to their respective dates.—*Jefferis* v. *East Omaha Land Co.*, 10 S. Ct. 518, 134 U.S. 178, 33 L. Ed. 872, *affirming*, C.C. 1889, *East Omaha Land Co.* v. *Jefferis*, 40 F. 386."

Petitioners' Lot 7 at the time of the survey and all times thereafter was bounded on the north by the Salt Fork Branch of the Arkansas River, when the patent was issued to said lot it was being diminished by erosion, the center line of the stream forming its northerly boundary was gradually moving south by east. Continually during this process of nature accretions were being added to land on the north side of the stream of which Lot 9, under which respondents' claim is a part, and by reason of same it was being enlarged. The lower court and the Appellate Court have correctly ruled with reference to the meaning and effect of the government patent to the lands in dispute.

Petitioners in their brief to this Court cite the case of *United States* v. *Champlin Refining Company*, from the Tenth Circuit, 156 F.2d 769, *affirmed*, 331 U.S. 788, 91 L. Ed. 1818, 67 Sup. Ct. 1346 (1946 case), to support their theory of having fixed rights as to the boundary back to the patent and government survey. This decision does not support them but supports the respondents. Please note the following statement of the law from the opinion:

> "(4) Grants by the United States of its public lands bounded on streams or other waters, navigable or non-navigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. As regards such conveyances, the United States assumes the position of a private owner, subject to the general law of the state. (*Hardin* v. *Shedd*, 190 U.S. 508, 519, 23 S. Ct. 685, 47 L. Ed. 1156; *Hardin* v. *Jordan*, 140 U.S. 371, 384, 11 S.Ct. 808, 35 L. Ed. 428; *Whitaker* v. *McBride*, 197 U.S. 510, 512, 25 S. Ct. 530, 49 L. Ed. 857.) Where it is disposing of tribal lands of Indians under guardianship, the same rule applies. (*Oklahoma* v. *Texas*, 258 U.S. 574, 595, 42 S. Ct. 406, 66 L. Ed. 771.)
>
> "The question here presented is what title passed by the patents when they were issued in 1906 and 1907, prior to the admission of Oklahoma into the Union. (*Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 87, 43 S. Ct. 60, 67 L. Ed. 140.)"

Oklahoma Adheres to the General Law of Accretion as Evidenced by 60 O.S.A. 335.

This was the holding of the lower and appellate courts that have considered this case. The last paragraph of Judge Huxman's opinion so states: "We think the Court correctly concluded that 60 O.S.A. 335, the Oklahoma law of accre-

tion, controlled the disposition of this case, and its judgment is, therefore, affirmed." The Oklahoma statute and its historical notes are as follows:

Title 60, paragraph 335, Riparian accretions:

"Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank. R.L. 1910, Para. 6750."

Historical Note

St. 1890, para. 4288; St. 1893, para. 3858; St. 1903, para. 4184; Comp. Laws 1909, para. 7369· Comp. St. 1921, para. 8556.

Origin: Comp. Laws, Dak. 1887, para. 3207.

The above statute and Title 60-336 have been under consideration in the following Oklahoma Supreme Court decisions:

—*Criswell* v. *Wilson*, 198 Okla. 47, 175 P.2d 87;

Mapes v. *Neustadt*, 197 Okla. 585, 173 P.2d 442;

Willett v. *Miller et al.*, 176 Okla. 279, 55 P.2d 90;

Goins et al. v. *Merryman et al.*, 183 Okla. 157, 80 P.2d 268.

There is no claim in any of the above cases that our statutory law was in violation of the 5th Amendment of the Constitution of the United States of America and there-

fore void as taking property without due process of law. It is pointed out by the Supreme Court of Oklahoma that our laws defining accretions and avulsions are derivatives of the common law. In the case of *Willett* v. *Miller, supra,* on page 92 of 55 P.2d of the Court's opinion we have the following observation by the Court:

> "It appears to be conceded that section 8556, *supra,* is declarative of the common law. So also is section 8561, *supra.*
>
> "The doctrine of accretion and reliction is well established in the common law and has often been held applicable in the several states" (Note: Section 8556, above, is same as 60 O.S.A. 335).

In opinion of the United States Court of Appeals for the Tenth Circuit, on July 31, 1957, a decision from the United States District Court for the Eastern District of Oklahoma was affirmed in *Littlefield* v. *Nelson,* 246 F.2d 956. This was a case of accretion under Oklahoma law, 60 O.S.A. 335. The Court held that the hastening of the accretion by government control projects did not prevent riparian owner from the addition of the land under doctrine of accretion. The Court, in its opinion in discussing the Oklahoma statute, states that there is an identical statute in the California Civil Code, Civil Code 1014, and that it has similarly been interpreted as a codification of the common law. Also this opinion points out that 60 O.S.A. 335 has been held declaratory of the common law, citing *Goins* v. *Merryman,* 183 Okla. 155, 80 P.2d 268.

The Center of the Stream Constitutes the Boundary.

It is an established rule in Oklahoma that where a non-navigable stream is made the boundary it is the center of the stream that constitutes the boundary and apart from changes due to avulsion the boundary continues therein and shifts with the current thereof. *State ex rel. Com'rs of Land Office* v. *Warden et al.*, 200 Okla. 613, 198 P.2d 402 (Okla., 1948). Also *Braddock* v. *Wilkins*, 182 Okla. 5, 75 P.2d 1139 (Okla., 1938). *State of Oklahoma* v. *State of Texas*, 258 U.S. 574, 42 Sup. Ct. 406, 414, 66 L. Ed. 771. *State of Nebraska* v. *State of Iowa*, 143 U.S. 459, 12 Sup. Ct. 396, 400, 36 L. Ed. 186.

Petitioners have contended throughout this action that the north boundary to their Lot 7 could be re-established pursuant to the way it is shown on the original government plat (P. R. 11-13). An examination of this exhibit reveals that the surveyors only measured the meanders of the upland. The measurements obviously are at the contact point of the upland and the river bed as it was found to exist at the time of the survey in 1871. Such survey did not fix a center meander line of the stream, and it may be added that such surveys never do. Petitioners have attached to their brief a copy of accretion determination map (P. R. 81) (copy filed with clerk) as was prepared and jointly introduced in the evidence below. This map does not purport to be a re-establishment of the center meander line as it would have existed at the date of the government survey. This is an accretion map prepared in exact accord with the rule for determining accretions in Oklahoma as announced in the case of *Goins* v. *Merryman*

et al., 183 Okla. 157, 80 P.2d 268 (Okla., 1938). The petitioners' contention for the idea that the boundary line was fixed has been urged throughout. Such contention is unsupported by the law and is without merit. Judge Huxman's opinion in this case disposed of it as follows:

> "But here we have no definitely fixed or established lines which can be ascertained at all times. Had the Patent conveyed Lot 7 to the center of the stream, as established by the survey of 1872, we would have a fixed line which might bring the case within the *Hunzicker* decision. There would still, however, remain the question whether it would be required that the river recede and that the land in dispute reappear on the same side of the stream with the remainder of Lot 7."

The Supreme Court of Oklahoma has not modified the common law of accretion, or the statutory law, 60 O.S.A. 335.

As a basis for this Court taking supervisory powers over this action the petitioners contend in their brief (pages 13-18) that the Supreme Court of Oklahoma in *Hunzicker et al.* v. *Kleeden et al.*, 161 Okla. 102, 17 P.2d 384 (Okla., 1932), and in *Mapes* v. *Neustadt*, 197 Okla. 585, 173 P.2d 442 (Okla., 1946), has modified the common law of accretion and the force, effect and application of Section 335, Title 60, pursuant to Section 2, Title 12, O.S. 1951.

In order that this Court may have the statute which petitioners have neglected to give, Title 12, Section 2, O.S. 1951, it is as follows:

> "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general Statutes of Oklahoma; but the rule of the

> common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object (R.L. 1910, Section 46-42)."

Also the notes to this section of the Oklahoma law taken from the Title 12 O.S.A. 2, appear to negative the very contention for which petitioners make the citation, it is as follows:

> "Legislation qualifying common-law rule respecting rights of riparian proprietor in natural flow of stream, did not impliedly abrogate common-law rule previously adopted therein by this section, relating to ownership of bed of nonnavigable stream. *State of Oklahoma* v. *State of Texas*, 42 S. Ct. 406, 258 U.S. 574, 66 L. Ed. 771, *modification denied* 43 S. Ct. 251, 260 U.S. 711, 67 L. Ed. 476."

The *Hunzicker* v. *Kleeden* and *Mapes* v. *Neustadt* cases have not modified the common or statutory law of accretion of Oklahoma. The opinion of Judge Huxman clearly distinguished these cases. The factual situation is clearly different. Factually, the *Hunzicker* v. *Kleeden* case has to do with accretions on the North Canadian River, a nonnavigable stream as it flows through Oklahoma City, Oklahoma County. Originally the city lots owned by plaintiff were not riparian. Later by action of the stream some became riparian, subsequently the stream receded and the plaintiff claimed the accreted land as his, on the theory of acquisition by accretion. It appears to have been agreed between the parties that the action of the stream amounted to accretion and not avulsion, however, the Court decided

the case on the basis that the plaintiff's city lots being non-riparian in the first instance, did have a definite determinable property boundary which was possible of definite determination after the stream receded. The syllabus by the Court is misleading because same neglected to state the lots were city lots, as distinguished from riparian lots.

Factually, the *Mapes* v. *Neustadt* case has to do with accretions and avulsions of lands along the North Canadian River in Blaine County, Oklahoma. The syllabus by the Court may be somewhat misleading unless one read the entire decision and gives attention to the factual situation between the parties. The case held that the acts of the stream were those of avulsion and no accreted land was allowed to be acquired by the plaintiff Mapes. Defendant Neustadt owned Lots 5 and 6 in the Southeast Quarter of the section and had an early patent from the Federal Government. His lots abutted the south bank of the river. Lots 3 and 4 which were never patented to anyone were in the river. Mapes owned the Northeast Quarter and his title was based on a patent from the Federal Government. At the time of the government survey the land was not touched by the river and it was obviously surveyed as a full quarter section of land. However, at the time patent was issued to Mapes in 1917 it was riparian land. Beginning in 1923 and continuing for many years the river continued its movement to the south restoring Lots 3 and 4 which were never patented and destroyed Lots 5 and 6, and then restored them. Mapes' contention was that the medial line of the non-navigable stream moved with the stream and that he was entitled to have by accretion the lands of Neustadt. The controlling feature of this case and one that distin-

guished it from the other cases is that the land of the plaintiff Mapes was never riparian to begin with. There was no stream forming its boundary. It is well established that before any land can concern itself with accretions that it must first have had as a boundary a stream or other body of water. When plaintiff Mapes' land was surveyed it had a straight survey line as its south boundary. Obviously, that was easily re-established.

There is no conflict in the Oklahoma decisions. The well-accepted principles of the law, both common and statutory have been followed.

Even though Oklahoma is one of the youngest states in the Union it has had before its Supreme Court the law of accretions from just about every conceivable approach. In most instances, but not all, this litigation has developed because of the enhanced value of mineral rights in lands and development of oil and gas fields. This has resulted in the Oklahoma law being more settled than in possibly many other older states where such condition has not existed. In some of the cases the important issue to be decided by the Court was one of fact, whether the situation be one of accretion or avulsion. In others it was as to the navigability of the stream, and whether the United States or Oklahoma had the ownership of the stream bed. The Supreme Court of Oklahoma, the United States District Courts in Oklahoma, United States Court of Appeals, and this Court are well due commending for their correct and careful treatment of each action concerning these problems. The Supreme Court of Oklahoma's decisions have been favorably upheld by the United States Court of Appeals for the Tenth (formerly Eighth) Circuit. In 1938 Oklahoma in the case

of *Goins* v. *Merryman, supra,* adopted the rule for apportionment of the accretions as established in *Johnston* v. *Jones,* 1 Black 209, 222, 66 U.S. 209, 222, 17 L. Ed. 117. The Oklahoma Legislature was careful when it made the proviso to Section 1, Title 75, O.S.A., to limit it to navigable streams. The Oklahoma Court very carefully distinguished in the cases of *Hunzicker* v. *Kleeden, supra* and *Mapes* v. *Neustadt, supra,* such cases from those where the land was riparian in the first instance. Careful investigation of all the Oklahoma decisions on the subject will show that there is no conflict in the Oklahoma law. It has never been obligated to reverse any of its decisions, nor modify its law. The law of real property as affected by accretions is so well settled in Oklahoma that one concerned with any particular riparian land well knows what his rights are and has been able to so rely. To rule in favor of the contentions of the petitioners in this action would result in complete chaos to the Oklahoma settled law of accretions. There is no evidence in the record that petitioners have drilled any oil or gas wells on the accreted land in dispute. The contrary appears, it is the respondents who have done so. The petitioners' land in dispute has at all times been riparian, this fact apprized them of the consequences of erosions and accretion and the settled law of Oklahoma applicable to such a situation. Were the conditions reversed and had the accretions been added to their Lot 7, is it conceivable that these petitioners would not claim the accretions as against Lot 9? The rule is well settled that where land is added to the lot by accretion the owner receives the benefit. And when erosion takes his land away, he suffers the loss. *Oklahoma* v. *Texas,* 268 U.S. 252 (1925); *Nebraska* v. *Iowa,* 143 U.S. 359 (1892); *St. Louis* v. *Rutz,* 138 U.S. 226 (1891);

Jefferis v. *East Omaha Land Co.*, 134 U.S. 178 (1890); *Jones* v. *Johnston*, 18 How. 150 (1855); *New Orleans* v. *United States*, 10 Pet. 662 (1836); *Chase* v. *Cheatham*, 194 Okla. 1, 146 P.2d 585 (1943); *Goins* v. *Merryman*, 183 Okla. 155, 80 P.2d 268 (1938); *State* v. *Warden*, 200 Okla. 613, 198 P.2d 402 (1948).

The United States Court of Appeals in rendering its decision herein correctly followed the law as announced in the Oklahoma case of *State* v. *Warden*, 200 Okla. 613, 198 P.2d 402 (1948).

Squarely in point, except for the fact that the issue arose on a navigable stream, is *Bryant* v. *Chicago Mill & Lumber Co.*, 216 F.2d 727 (C.A. 8, 1954). As the Court bluntly put it in *Anderson-Tully Co.* v. *Tingle*, 166 F.2d 224, 228-229 (C.A. 5, 1948): "Where a river is a boundary, and there is no avulsion, a landowner can never cross the river to claim an accretion on the other side."

CONCLUSION

1. The patent to petitioners' Lot 7 being without reservation or restriction does not offer an escape to them of the operation of the common and statutory law of accretions followed in Oklahoma.

2. The United States Court of Appeals for the Tenth Circuit in affirming the judgment of the United States District Court for the Western District of Oklahoma has not decided any important state question in a way in conflict with the applicable law of Oklahoma.

3. The state statute, 60 O.S.A. 335, is based on the common law and is not in violation of the Constitution of the United States

4. The courts in considering and rendering their judgments in this action have not misconstrued Oklahoma statute, 60 O.S.A. 335.

5. Section 1, Title 75 O.S. 1951, has not changed or modified, 60 O.S.A. 335.

6. The courts herein have not misconstrued or misinterpreted the Oklahoma Supreme Court decisions, *Hunzicker* v. *Kleeden*, *supra*, and *Mapes* v. *Neustadt*, *supra*.

The Petition for a Writ of Certiorari should be denied.

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February, 1958.